

Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons

HIRO N. ARAGAKI*

TABLE OF CONTENTS

I. INTRODUCTION	408
II. DELIBERATIVE DEMOCRACY'S ORIENTATION TO CONFLICT	415
A. <i>Deliberation and the Fact of Reasonable Pluralism</i>	416
B. <i>The Nature of Conflict in a Deliberative World</i>	420
C. <i>Conflict Resolution as Epistemology</i>	423
III. INTEREST-BASED DISPUTE RESOLUTION'S ORIENTATION TO CONFLICT	430
A. <i>The Dynamics of Conflict</i>	430
B. <i>Negotiating Over Interests</i>	440
IV. CONFLICTS OF ORIENTATION: DELIBERATIVE DEMOCRACY THEORY FROM AN IBDR PERSPECTIVE	446
A. <i>The Taming of Interest</i>	447
B. <i>The Uncertain Status of Interest-Based Problem Solving</i>	455
C. <i>The Poverty of Reasons</i>	462
D. <i>Public Reasoning as Adjudication</i>	469
V. CONCLUSION.....	476

* B.A. (Yale), M.Phil (Cantab), J.D. (Stanford). Assistant Professor of Legal & Ethical Studies, Fordham University Graduate School of Business Administration. A distant relative of this paper benefited from constructive comments by participants at the AALS Dispute Resolution Section's works-in-progress conference at Arizona State University's Sandra Day O'Connor College of Law. In addition, I wish to thank Carrie Menkel-Meadow and Amy Cohen for helpful conversations at the early stages of this project, and Kyle Gerard Baker, Kevin Mahoney, and the editors of the present journal for their extremely helpful editorial assistance.

I. INTRODUCTION

In recent years, there has been a growing recognition of the congruence between deliberative democracy and interest-based dispute resolution (or “IBDR”).¹ Consensus building practitioners, for example, increasingly find their work referred to as “deliberative” or as seeking to foster “democratic dialogue.”² And deliberative democracy theorists, previously reluctant to acknowledge the import of empirical lessons for their normative project, have begun to take a greater interest in IBDR processes unfolding on the ground.³

¹ By interest-based dispute resolution, I refer to (a) consensual dispute resolution processes—broadly conceived to include conflict resolution, mediation, problem solving about disputes, and consensus-building over disputed issues—that (b) emphasize the importance of understanding and negotiating over the deeper interests at stake in a conflict, not the stated positions that lie at its surface.

I exclude adjudicative models (such as arbitration and litigation), rights-based models, and other consensual dispute resolution processes (such as judicial settlement conferences and narrative mediation) that do not focus on mutual understanding and the satisfaction of interests. Certain approaches, such as transformative mediation, could perhaps be considered a species of IBDR for some purposes or in some contexts but not in others. See, e.g., Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 72–73 (2002) (explaining that transformative theory emphasizes “people’s interaction with one another as human beings” and views conflict as “not only, or primarily, about . . . interests”).

I am indebted to Amy Cohen for coming up with the abbreviation “IBDR.” See Amy J. Cohen, *Dispute System Design, Neoliberalism, and the Problem of Scale*, HARV. NEGOT. L. REV., manuscript at 13 (forthcoming) (on file with author).

² See Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute System Design and the Mediation of Contested Parades in Northern Ireland*, 22 OHIO ST. J. ON DISP. RESOL. 133, 133 (2006) (describing ways in which ADR institutions such as Northern Ireland’s Parades Commission can deepen “democratic dialogue”); see also JOHN FORESTER, *THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES* 235 (1999) (arguing that the “deliberative character” of urban planning is most evident in participatory processes that involve “mediated negotiations”); Carrie Menkel-Meadow, *Lecture, Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 554 (2006) (referring to deliberative democracy as a form of complex dispute resolution); Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 336, 350–51 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (advocating a process of “moral deliberation” for the negotiated resolution of significant cases); Joseph B. Stulberg, *Questions*, 17 OHIO ST. J. ON DISP. RESOL. 531, 539 (2002) (conceiving of mediation as a “democratic dialogue process[.]”).

³ This is evident in several recent exchanges between deliberative theorists and students of public dialogue projects. See generally DEEPENING DEMOCRACY:

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

To the IBDR community (of which I consider myself a part), these developments tell a larger story about IBDR's social and political calling. Not satisfied with Owen Fiss's famous critique of alternative dispute resolution as appropriate only for "quarrels between neighbors" and the like,⁴ IBDR theorists have sought to demonstrate the relevance of their discipline for broader questions about democratic citizenship and political design. Carrie Menkel-Meadow, for instance, has proposed that conflict resolution can provide "useful models for democratic participation and political decisionmaking" that offer alternatives to prevailing adversarial, win-lose processes.⁵ Roger Fisher and William Ury have suggested that interest-based problem solving has a number of "social benefits," including "serv[ing] values of caring and justice" and helping to "make the world a better place."⁶ And because he believes that conflict resolvers are "designers of practical democratic processes," Bernard Mayer has emphasized dispute resolution skills as "critical" to effective participatory democracy.⁷

Deliberative democracy, broadly conceived, has for some time been viewed as IBDR's natural ally in these and similar efforts. The two fields, it has been said, share "similar intellectual roots" and "have been working in

INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003); *DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN?* (Shawn W. Rosenberg ed., 2007). *See also* James Bohman, *Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict*, 23 POL. THEORY 253, 270 (1995) (looking to "[t]hird-party mediation of conflicts" as a model for the author's theory of plural public reason); John S. Dryzek & Simon Niemeyer, *Reconciling Pluralism and Consensus as Political Ideals*, 50 AM. J. POL. SCI. 634, 643 (2006) (pointing to mediation and consensus-building as examples of ways to foster the authors' vision of "normative meta-consensus").

⁴ Owen Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). A number of other scholars have made similar critiques of ADR in general. *See, e.g.*, David Luban, Essay, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2634–35 (1995) (describing problem-solving as a form of private ordering in which judicial involvement is regarded as a nuisance, not a public good); Laura Nader, *The Globalization of Law: ADR as "Soft" Technology*, 93 AM. SOC'Y INT'L L. PROC. 304, 308–09 (1999) (arguing that alternative dispute resolution addresses efficiency and harmony concerns at the expense of concerns about public justice).

⁵ Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348–49 (2004); *see* Lawrence E. Susskind, *Consensus Building, Public Dispute Resolution, and Social Justice*, 35 FORDHAM URB. L.J. 185, 190–91 (2008) (arguing that interest-based dispute resolution may provide a more robustly democratic procedure for resolving public policy issues than a traditional public hearing process).

⁶ ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 154–55 n (2d ed. 1991).

⁷ BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE* 245–46 (2000).

parallel.”⁸ Both plainly emphasize the value of participatory, dialogic processes predicated on mutual respect and cooperation. And at first glance, both appear to believe in the benefits of interest-based problem solving.⁹ The perception of such common origins and normative commitments has generated a tremendous amount of optimism—especially from the IBDR side—about the potential for cross-pollination and collaboration between the two fields.¹⁰

But in our enthusiasm to celebrate the synergy between IBDR and deliberative democracy, it strikes me that we may have failed to grapple with some foundational questions about the significant differences that set them apart. Is it so clear, for example, that deliberative democracy is a scaled-up model of dispute resolution—a sort of dispute resolution “writ large”?¹¹ Do both fields regard interest-based problem solving in compatible ways? Are dispute resolution processes micro-expressions of the type of public, political

⁸ Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity*, 12 DISPUTE RESOL. MAG. 18, 18 (Winter 2006).

⁹ See *id.*. I question whether this is truly the case below. See *infra* Part IV.B.

¹⁰ In 2005, for example, the Hewlett Center and Harvard Law School’s Program on Negotiation sponsored a two-day workshop on deliberative democracy and dispute resolution that brought together leading figures from both fields. See <http://ocw.mit.edu/OcwWeb/Urban-Studies-and-Planning/11-969Summer-2005/CourseHome/> (last visited May 20, 2009). Similarly, in 2008, U.C. Hastings College of the Law hosted a two-day conference entitled, “Toward Collaborative Governance: A Conversation at the Crossroads of Civic Engagement and ADR.” The conference brought together scholars, practitioners, and public policy makers to discuss new methods of policy making through public policy facilitation. See Center for Negotiation and Dispute Resolution Homepage, <http://www.uchastings.edu/centers/negotiation-adr/index.html> (last visited May 20, 2009).

This enthusiasm has not been confined to the academy. In 2006, for example, the ABA’s Dispute Resolution Magazine devoted an entire issue to the topic of “What Deliberative Democracy Means for Dispute Resolution.” See generally DISP. RESOL. MAG. (Winter 2006).

¹¹ See, e.g., Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 30 (2000) (proposing that “modern democratic processes can be thought of as mediation writ large.”). To be sure, Menkel-Meadow is keenly aware not just of the similarities but also of the significant differences between dispute resolution and deliberative democracy. See Menkel-Meadow, *supra* note 5, at 348–50 (distinguishing between deliberative democracy and dispute resolution and suggesting ways in which the former can incorporate lessons from the latter).

engagement advocated by deliberative democrats?¹² Many have posed these questions,¹³ but to my knowledge, few have offered any detailed answers.¹⁴

To be sure, no one article could possibly lay these questions to rest. My goal here is not so much to provide answers as to underscore certain salient differences in the *normative* assumptions of IBDR and deliberative democracy—differences that should give us pause and make us consider the foundational questions more seriously. These differences cluster around each field's understanding of and approach to conflict.

In their eloquent and original book, *The Promise of Mediation*, Robert Baruch Bush and Joseph Folger describe an "orientation to conflict" as consisting of two elements: a conception of what conflict is—"how it can be identified, thought of, and discussed"—and an idea of what the response to it should be—"what people in conflict should do to reach successful results."¹⁵ Borrowing Bush and Folger's expression, I argue that deliberative democracy and IBDR represent fundamentally different orientations to conflict.

For deliberative democrats, conflict is what happens when diverse belief systems or visions of the good life collide or pull us apart in opposing directions.¹⁶ Classic examples are the apparent conflict between the dictates of religious fundamentalism and liberal constitutionalism, or between the pro-life and pro-choice positions on abortion.¹⁷ Deliberative democrats

¹² For examples of such claims, see KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 147 (2001) (arguing that mediation "represents, in smaller venues and scales," the principles of "democratic governance"); Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 415 (2006) (arguing that mediation has an "internal democracy").

¹³ Carrie Menkel-Meadow has been at the forefront of framing these questions and bringing them to the attention of other IBDR scholars. See generally Menkel-Meadow, *supra* note 5; Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002); Menkel-Meadow, *supra* note 8.

¹⁴ In this vein, Richard Reuben's observation in 2004, that "the relationship between . . . democracy and dispute resolution generally, has simply fallen through the cracks of scholarly attention," appears no less true now in the particular case of deliberative democracy and IBDR. See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 281 (2004) (internal citation omitted).

¹⁵ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 55–56 (1994).

¹⁶ See *infra* Part II.B.

¹⁷ Even a mundane conflict over scarce resources, when framed as a disagreement over claims or principles (say, of distributive fairness), can be seen as a function of value pluralism.

believe that our success at resolving such conflicts hinges on the degree to which we can justify a resolution to our opponents, or at least convince them of its correctness based on the information and arguments that we bring to the table. The appropriate response to conflict is therefore a process of rational argumentation: marshaling evidence and reasons that, even if they do not succeed in reconciling our differences, allow us to continue the conversation in a spirit of mutual respect.¹⁸

By contrast, IBDR views conflict as a dynamic phenomenon—a struggle between real human beings that affects the way they relate to one another, even, or especially, through dialogue and reason-giving. On this view, rational argumentation about the merits of conflicting claims is of limited value. For even with the best of intentions, efforts to change or convince our opponents risk becoming consumed by the destructive forces of conflict. The appropriate response is not to continue the same conversation but to start a new one—one that probes beneath the surface level of stated positions to the frustrated interests that, on the IBDR view, are the true drivers of disputes.

From a deliberative perspective, IBDR's focus on interests is a step backward in the evolution of democratic theory.¹⁹ The more we privilege interests, the more politics becomes a sphere of purely strategic or instrumental interaction—a “Hayekian nightmare” in which groups compete against each other to achieve their parochial self-interests with little regard for the common good.²⁰ Because deliberativists perceive individual and common interests to be in constant tension, conflict resolution in a deliberative democracy requires relinquishing our pressing interests for the better judgment of public reasons. This is why a central ideology of IBDR—to “focus on interests, not positions”²¹—turns out to be of questionable value for deliberative theory.

To some in the IBDR community, these preliminary conclusions about the two fields' divergent orientations to conflict will appear somewhat exaggerated. And in many ways they are. On the ground, IBDR does not seem nearly so inconsistent with deliberation (broadly construed) and arguably furthers democratic ideals such as autonomy and participation. Moreover, public decisionmaking projects convened or endorsed by supporters of deliberative democracy (and new governance generally)²² have

¹⁸ See *infra* notes 38–41 and accompanying text.

¹⁹ See *infra* notes 191–218 and accompanying text.

²⁰ See Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 325 (1997).

²¹ FISHER ET AL., *supra* note 6, at 40–55.

²² Although there is a significant overlap between certain new governance models and deliberative democracy, for purposes of this article, I consider them distinct

managed to incorporate IBDR techniques such as integrative negotiation without raising any eyebrows.²³

If my conclusions appear overstated, it is because I take certain liberties in order to illustrate more vividly the divergent normative commitments of IBDR and deliberative democracy—what each theory assumes to be important or unimportant, what each asks us to value or could care less if we forsook. It is precisely because these theory-level differences have previously been obscured that the need to highlight them is so pressing at this time.

To be sure, there will be internal disagreements about just what those commitments are. For instance, there are currently many different schools of deliberative democracy. In this article, I consider mainly the work of Joshua Cohen, Amy Gutmann, Dennis Thompson, and Cass Sunstein—what I take to be a representative group of deliberative democracy's leading exponents. These theorists are not in perfect agreement and, at several points in this article, will undoubtedly distance themselves from "deliberative democracy theory" as I present it. But there is enough of a consensus among them about a core set of propositions that, in my view, makes it possible to speak of deliberative democracy theory as a coherent body of knowledge.

Similarly, what I call "IBDR theory" is in fact a placeholder for several distinct but related enterprises inspired by conflict resolution, consensus building, and integrative or interest-based negotiation. Each, in turn, draws on the conceptual resources of a variety of related disciplines—psychology, law, urban planning, and game theory, to name a few. There is no unanimity among these IBDR constituents on many of the issues I consider. But I submit that they all share sufficiently overlapping normative understandings

theoretical enterprises that are not necessarily interchangeable. To deliberative theorists, the problem with some new governance initiatives is that they do not always meet the standards of "deliberation." See, e.g., Joshua Cohen, *Deliberative Democracy*, in *DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN?*, *supra* note 3, at 219, 222–23 [hereinafter Cohen, *Deliberative Democracy*]; Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 *ANN. REV. POL. SCI.* 497, 498 (2008).

For an excellent discussion of the intersection between negotiation and new governance generally, see generally Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills and Selves*, 33 *LAW & SOC. INQUIRY* 503 (2008) [hereinafter Cohen, *New Governance*].

²³ See Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 *J. LEGAL EDUC.* 7, 15–16 (2004) (describing the use of interest-based negotiation approaches in public policy dialogues). See generally Lisa Blomgren Bingham, *The New Urban Governance: Processes for Engaging Citizens and Stakeholders*, 23 *REV. POL'Y RES.* 815 (2006) (describing use of interest-based techniques in participatory governance projects).

of conflict, and of its relationship to human needs and interests, to make this investigation worthwhile.

My preliminary conclusions should lead IBDR theorists to look at deliberative democracy in a new way. True, both fields share an optimism in the power of participatory dialogue to settle difficult conflicts in ways that transcend existing top-down and often adversarial alternatives. But our respective beliefs about the type of dialogue best suited to address such conflicts, and indeed about the nature of conflict itself, are not always compatible.

To deliberative theorists, my goals for this article are twofold. The first is to underscore the importance of attending to human needs and interests and, more importantly, what we lose by failing to do so.²⁴ The second is to chip away at what I take to be the perception of IBDR as a practice-oriented field that has comparatively little to contribute to a theoretical debate about what conflict resolution in the public sphere *should* look like. My secondary purpose, then, is to suggest that IBDR does in fact have a coherent normative agenda, one that is capable of engaging deliberative theory on its own turf.²⁵

This article proceeds as follows: In Part II, I begin by providing a basic account of deliberative democracy and introduce deliberative democracy's orientation to conflict. To deliberativists, conflict resolution is a cooperative process of justification that privileges an epistemic²⁶ process of weighing

²⁴ See *infra* Part IV.

²⁵ To my knowledge, few, if any, IBDR loyalists have thus far attempted a sustained dialogue with deliberative democracy at this (theoretical) level. Notable exceptions include Carrie Menkel-Meadow, John Forester (in the related context of urban planning), and Amy J. Cohen (in the related context of new governance). See generally FORESTER, *supra* note 2; Cohen, *New Governance*, *supra* note 22; Menkel-Meadow, *supra* notes 5, 8, 13.

Some, like new governance theorist Archon Fung, have questioned whether there is any intersection at all between IBDR theory and deliberative theory, at least enough to keep scholars busy talking about it. See Archon Fung, *Reflections on MIT Dispute Resolution/Deliberative Democracy Meeting*, (transcript available at http://ocw.mit.edu/NR/rdonlyres/Urban-Studies-and-Planning/11-969Summer-2005/4C546697-20DC-48E8-B6D3-34D139F736BD/0/fung_ref.pdf) (observing that at present, it is not clear that deliberative theorists and dispute resolution practitioners have much to talk about, and that the dispute resolution community has so far avoided articulating a more theoretical conception of dispute resolution "writ large"). This article is in part a response to Fung's observations and in part an effort to fill a void in the existing literature.

²⁶ The term "epistemic" has acquired a particular meaning in the deliberative democracy literature. I use the term more loosely here. For further discussion, see *infra* notes 65–69 and accompanying text.

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

reasons. The human dynamics of conflict are largely epiphenomenal; they can and should be excised from deliberation.

IBDR's orientation to conflict is the subject of Part III. Unlike deliberative democracy, IBDR takes a wide angle approach that understands conflict as a relational phenomenon—one that distorts discourse and, in extreme cases, brings it to a screeching halt. In this section, I explain this conception of conflict and show why it regards negotiation over needs and interests, rather than deliberation, as critical to conflict management.

In Part IV, the heart of the article, I turn to certain salient differences between deliberative democracy and IBDR's respective orientations to conflict. I begin by unpacking basic assumptions that deliberative theory makes about the interests at stake in a conflict and their relationship to the common good. Next, I trace the implications of these assumptions for the purported compatibility between interest-based negotiation and deliberation. I then use the conflict between fundamentalist Christians and the liberal state in *Mozert v. Hawkins County Board of Education*²⁷ to describe how deliberative theory's emphasis on reasons over interests betrays an impoverished approach to the handling of conflict. That approach, I argue, is in many respects closer to adjudication than consensual problem solving. I conclude by suggesting directions for further research for those interested in the political promise of IBDR.

II. DELIBERATIVE DEMOCRACY'S ORIENTATION TO CONFLICT

For deliberative democracy theory, conflict resolution is a cooperative process of collective justification aimed at reaching the "right" result through a process of "rational argument."²⁸ The assumption is that conflicts can be managed by attending primarily to conceptual matters—by "stand[ing] outside the arena of self-interested combat . . . [in order to] judge the merits of the conflicting claims."²⁹ This largely intellectual orientation to conflict, I argue, considers the human dynamics of conflict to be irrelevant to, and thus severable from, the task of conflict resolution.

²⁷ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

²⁸ Cohen, *Deliberative Democracy*, *supra* note 22, at 222–23.

²⁹ AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 20 (1996). I do not mean to portray deliberation as an emotionless or purely legalistic form of discourse. See *infra* note 266 and accompanying text; *infra* text accompanying notes 339–340.

A. *Deliberation and the Fact of Reasonable Pluralism*

"[W]hat this man commends, that is to say, calls *good*, the other man undervalues, as being *evil*. . . Whilst thus they do, necessary it is there should be discord, and strife."

—Thomas Hobbes³⁰

In classical democracies like Periclean Athens, political decisions and arrangements could be justified by reference to a shared *ethos*—a set of normative assumptions about which there was unproblematic agreement.³¹ In stark contrast, modern democracies appear beset by persistent and profound disagreement. These disagreements have sometimes been so "irreconcilable" and "intractable," John Rawls once observed, that "[w]e should find it remarkable that . . . just cooperation among free and equal citizens is possible at all."³²

Take the problem of abortion. To some groups, liberalism's respect for individual freedom requires legalizing abortion in order to honor a woman's fundamental right to control her body. To others, the failure to prohibit abortion amounts to state-sanctioned murder. Or consider cases where Christian Scientists refuse medical treatment for their children. Physicians claim it would be a violation of basic norms of their profession and medical ethics to allow suffering that could easily be treated. Yet Christian Scientist parents sincerely believe that they would disobey the word of God just by seeking a medical diagnosis.

In these and other examples, we come up against what deliberative democrats refer to as the "fact of reasonable pluralism": the fact that there are "distinct, incompatible philosophies of life,"³³ each reasonable in the sense that its adherents are "stably disposed to affirm it as they acquire new information and subject it to critical reflection."³⁴ Instead of the unity of

³⁰ THOMAS HOBBS, *MAN AND CITIZEN: DE HOMINE AND DE CIVE* 150 (Bernard Gert ed., 1972).

³¹ Cf. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 95 (William Rehg trans., 1996) (describing the "classical, primarily Aristotelian, doctrine of natural law" as "still reflect[ing] an encompassing societal ethos that extended through all social classes").

³² JOHN RAWLS, *POLITICAL LIBERALISM* 3–4 (expanded ed. 2005).

³³ Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY* 185, 187 (Jon Elster ed., 1998).

³⁴ Joshua Cohen, *Moral Pluralism and Political Consensus*, in *THE IDEA OF DEMOCRACY* 270, 281–82 (David Copp et al. eds., 1993). For other conceptualizations of the fact of reasonable pluralism, see RAWLS, *supra* note 32, at 36 (describing a "permanent feature" of modern democracies as the fact that "a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines will come

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

value, in modern societies we seem to confront its radical fragmentation into what Rawls thinks of as distinct but sometimes overlapping “comprehensive doctrines.”³⁵

With a growing appreciation of this predicament, political theory has been forced to retreat from (without completely abandoning) the articulation of overarching *substantive* values or principles toward the identification of *procedures* that best justify them.³⁶ Deliberative democracy theory is a relatively recent iteration of this shift. Given modernity’s unavoidable “fact of reasonable pluralism,” it proposes that political outcomes and arrangements should be considered democratically legitimate (and thus binding on all) only if, among other things, they issue from a process of mutual reason-giving.³⁷

In a deliberative forum, political actors give and test reasons for or against a particular proposal “with the expectation that those reasons (and not, for example, their power) will settle the fate” of the proposal.³⁸ But in

about and persist.”); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 407, 408 (James Bohman & William Rehg eds., 1997) [hereinafter Cohen, *Procedure and Substance*] (describing the existence of “distinct, incompatible understandings of value” that are each reasonable in the sense that the “good-faith exercise of practical reason, by people who are reasonable in being concerned to live with others on terms that those others can accept, does not lead to convergence on one particular philosophy of life”).

³⁵ See generally RAWLS, *supra* note 32.

³⁶ See, e.g., Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 *CONSTELLATIONS* 26, 29, 34 (1994) (“Agreements in societies living with value-pluralism are to be sought for not at the level of substantive beliefs but at the level of procedures, processes, and practices for attaining and revising beliefs.”); Cohen, *Procedure and Substance*, *supra* note 34, at 408.

³⁷ See HABERMAS, *supra* note 31, at 33 (arguing that the legitimacy of modern law derives from how well it reflects the “rational self-legislation of politically autonomous citizens,” achieved through a process of “communicative action and deliberation”); Benhabib, *supra* note 36, at 29–31; Simone Chambers, *Deliberative Democratic Theory*, 6 *ANN. REV. POL. SCI.* 307, 331 (2003).

Some deliberative democrats have argued that the result of such a deliberation should aim toward “consensus.” See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, *supra* note 34, at 67, 73; Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1550 (1988). More recently, the importance of consensus for deliberative democracy theory has come into some doubt. See Chambers, *supra* note 37, at 320.

³⁸ Cohen, *supra* note 37, at 74; see also José Luis Martí, *The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness, and Equal Political Autonomy*, in *DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS* 27, 28–29 (Samantha Besson & José Luis Martí eds., 2006) (describing deliberation as the “exchanging [of] reasons—for or against certain proposals—with the purpose of rationally convincing

conditions of reasonable pluralism, deliberators cannot expect that what persuades local constituents will likewise move unfamiliar groups that may subscribe to different, and perhaps incommensurable, doctrines. Thus, they are forced to articulate their positions in other-regarding ways, using reasons that are both intelligible and acceptable even to those with whom they disagree about the most foundational matters.³⁹ In this way, deliberation orients political actors to think beyond their immediate perspectives toward “the interest of all considered as free and equal moral beings”—what deliberative theorists refer to as the “common good.”⁴⁰ Deliberation is not just another word for discussion. Rather, it is a certain type of discussion that involves disciplined justifications and “rational argument.”⁴¹

Deliberation is frequently juxtaposed against two other prevalent models for resolving political disputes—voting and bargaining—as a way of highlighting its distinctiveness.⁴² To deliberative theorists, pure voting (or “aggregative”) models do not fully capture the promise of democracy.⁴³ A system of majority rule, for example, can result in grave injustice to minorities.⁴⁴ And voting can produce results that do not even reflect what the *majority* would have considered to be in its true interest had the vote been

others, instead of strategic participation oriented to imposing personal political preferences or desires on others.”).

³⁹ See Benhabib, *supra* note 36, at 32 (explaining that participants in discourse are forced to “think of what would count as a good reason for all others”); Cohen, *Procedure and Substance*, *supra* note 34, at 414 (“In an idealized deliberative setting . . . [participants] find reasons that are compelling to others, acknowledging those others as equals, aware that they have alternative reasonable commitments, and knowing something about the kinds of commitments that they are likely to have.”).

⁴⁰ Benhabib, *supra* note 36, at 29–34; Cohen, *supra* note 37, at 69; Sunstein, *supra* note 37, at 1554.

⁴¹ Cohen, *Deliberative Democracy*, *supra* note 22, at 222.

⁴² See Jon Elster, *Introduction to DELIBERATIVE DEMOCRACY*, *supra* note 33, at 1, 4–5 (contrasting deliberation with voting and bargaining and stating that the three comprise an “exhaustive list” of decisionmaking procedures for modern societies).

⁴³ By “pure” voting models, I mean those that see little or no hope in the efficacy of deliberation or dialogue at mediating the conflicts that characterize complex, industrialized societies. These models are most closely associated with the work of Joseph Schumpeter. See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (2d ed. 1947).

⁴⁴ As John Dryzek and Simon Niemeyer have remarked, “[T]he politically weighted sum of private interests so clearly does not add up to the public interest.” Dryzek & Niemeyer, *supra* note 3, at 635; see also Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985 (2001) (discussing numerous objections to simple majority voting).

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

preceded by a reasoned discussion.⁴⁵ Bargaining-based models are also wanting. Bargaining,⁴⁶ in this view, treats individual and group desires as fixed and seeks only to maximize the fulfillment of those desires through “threats,” “intimidation,” and “strategic and manipulative behavior.”⁴⁷ Even in optimal circumstances, the argument goes, bargaining achieves only compromise or accommodation, not reasoned decisionmaking.⁴⁸

The deliberative model has been analogized to an academic seminar or a scientific collaboration in which participants are genuinely motivated to reach the right outcome based on a searching consideration of the evidence and arguments.⁴⁹ Such a model is certainly appropriate for many conversations that lie at the heart of a democratic system of government. But IBDR scholars should question whether it is compelling or desirable even as

⁴⁵ See generally Jane J. Mansbridge, *Living with Conflict: Representation in the Theory of Adversary Democracy*, 19 ETHICS 466, 466–67 (1981) (arguing that voting asks citizens to accept political decisions as legitimate “simply because they have been counted equally in it” and not because those decisions are right or good in some deeper sense).

⁴⁶ By “bargaining,” deliberative theorists refer to what IBDR scholars would variously call “distributive bargaining,” “positional bargaining,” or “win-lose bargaining,” whose purpose is to maximize one’s gain at the expense of the other. See, e.g., Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 326 (describing distributive bargaining). Thus, Jon Elster analogizes “bargaining” to “sequential ‘divide-a-dollar’ games in which the parties make successive offers and counteroffers.” Elster, *supra* note 42, at 6. “Bargaining,” as the term is used by deliberative theorists, does not appear to include interest-based or “integrative” models of bargaining and negotiation. See, e.g., *id.*

⁴⁷ See Sunstein, *supra* note 37, at 1550 (contrasting deliberation with negotiation). For example, bargaining has been described as involving “deceptions, threats, promises, concessions” that “cannot count as reasons.” Martí, *supra* note 38, at 31; see also Samantha Besson & José Luis Martí, *Introduction to DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS*, *supra* note 38, at xiii, xvi. IBDR theorists would take issue with these one-sided and somewhat outdated conceptions of what counts as bargaining.

⁴⁸ See, e.g., GUTMANN & THOMPSON, *supra* note 29, at 43 (arguing that bargaining and negotiation are not appropriate for truly “moral” conflicts); Bohman, *supra* note 3, at 268; Sunstein, *supra* note 37, at 1554 (arguing that bargaining is fundamentally inconsistent with the republican ambition of seeking “agreement among political participants”).

⁴⁹ See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1688 (1998) (criticizing deliberative democracy theorists for “a tendency to base their model of democracy on the analogy of faculty meetings”); see also Angel R. Oquendo, *Deliberative Democracy in Habermas and Nino*, 22 OXFORD J. LEGAL STUD. 189, 220–21 (2002) (analogizing the deliberative model of political discourse to an “extraordinary university faculty meeting” and proposing the theatrical play as a more accurate alternative).

a counterfactual model for the type of scaled-up problem solving they might wish to endorse. For as the following section will demonstrate, the deliberative model focuses on the contradictions of value pluralism at the expense of something much more central to IBDR's worldview: The dynamics of human conflict.

B. *The Nature of Conflict in a Deliberative World*

"In resolving Heinz's dilemma, Jake . . . defuses a potentially explosive conflict between people by casting it as an impersonal conflict of claims. In this way, he abstracts the moral problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute."

—Carol Gilligan⁵⁰

Carol Gilligan's by now well-known findings regarding the different responses of adolescent boys and girls to the Heinz dilemma⁵¹ provide an instructive lens through which to understand the nature of conflict in the deliberative imagination.⁵² Boys like Jake take what Gilligan aptly describes as a "potentially explosive" life-or-death conflict and translate it into a

⁵⁰ Carol Gilligan, *Images of Relationship*, 81 N.D. L. REV. 693, 700 (2005), reprint of CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24–63 (1982).

⁵¹ The Heinz dilemma has been widely used in experiments on moral reasoning. According to the terms of the dilemma, Heinz's wife is suffering from a rare disease that can only be cured by a drug developed by a local druggist. Heinz cannot afford the cost of the drug, which the druggist is selling at a steep profit. He pleads with the druggist to sell him the drug at a lower cost or to allow him to pay later. Despite what he knows to be a life-or-death situation, the druggist selfishly answers, "No, I discovered the drug and I'm going to make money from it." Desperate, Heinz breaks into the druggist's store and steals the drug to save his wife. The question posed to test subjects is whether Heinz should have done so. For a well-known rendition of the dilemma, see Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order: I. Sequence in the Development of Moral Thought*, 6 VITA HUMANA 11, 18–19 (1963).

⁵² Some conflict resolution scholars have referred to Gilligan's work in part to emphasize the importance of relationship or connection, even between parties in conflict. On this view, dispute resolution seeks to foster a distinctively moral sense of interdependence or way of relating to one another—for example, through empowerment and recognition. See, e.g., BUSH & FOLGER, *supra* note 15, at 81–84; cf. *id.* at 242–51.

My use of Gilligan's work in this article is much more limited in scope and should not necessarily be construed as an endorsement of this view. I merely suggest that the difference between boys' and girls' responses to moral conflicts, as identified by Gilligan, is a useful way to think about the difference between what I refer to as conceptual and relational conflict.

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

conflict between doctrines or principles.⁵³ Girls see the conflict in relational terms; they perceive the human impact of the druggist's greed.⁵⁴ For them, the conflict is less about unfairness and more about the druggist's failure to empathize—as one girl put it, “to understand what [Heinz] is experiencing.”⁵⁵

Deliberative democracy theory views conflict much as Jake does—as the surface manifestation of a deeper contradiction between “philosophies of life”⁵⁶ that can be blunted or perhaps dissolved by analysis and reason-giving. On this view, conflict is at root a collision of diverse “religious, philosophical, or moral *doctrine[s]*.”⁵⁷ Thus, in their seminal book on deliberative democracy, Amy Gutmann and Dennis Thompson argue that intractable political conflicts over abortion, pornography, and capital punishment represent “conflicting moral *perspectives* more than competing self-interests.”⁵⁸

But a closer look at the lived contexts of moral disagreement brings into focus something more than just a conflict between Rawlsian comprehensive doctrines. The deep chasms that separate pro-life and pro-choice activists are not adequately captured in the notion that each reasons “from different

⁵³ Gilligan, *supra* note 50 at 701.

⁵⁴ *Id.* at 701, 722.

⁵⁵ *Id.* at 722.

⁵⁶ Cohen, *supra* note 33, at 187 (equating “philosophy of life” with Rawls’s notion of a “comprehensive doctrine”).

⁵⁷ RAWLS, *supra* note 32, at xxv (emphasis added); *see also id.* at 4 (“The most intractable struggles . . . are confessedly for . . . religion, for philosophical views of the world, and for different moral conceptions of the good.”). Similarly, Joshua Cohen appears to think of “doctrinal conflicts” as just another manifestation of the “fact of reasonable pluralism.” *See* Joshua Cohen, *A More Democratic Liberalism*, 92 MICH. L. REV. 1503, 1504 (1994). Gutmann and Thompson, too, focus on conflicts in which citizens “continue to differ about basic moral principles.” GUTMANN & THOMPSON, *supra* note 29, at 73.

⁵⁸ GUTMANN & THOMPSON, *supra* note 29, at 20 (emphasis added) (referring to abortion as the “paradigm” of deliberative disagreement). Although Gutmann and Thompson concede that material scarcity and human egoism are also sources of conflict, *id.* at 21–25, their overriding concern is the propositional conflict between moral claims or doctrines. Hence they treat “moral differences” and “moral conflicts” as if they were essentially the same thing. *See id.* at 11–51; *see also* Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 1 (1999) (equating moral “controversies” with moral “conflicts”). Joshua Cohen appears to be in accord. He notes that there are many kinds of difference that divide modern societies—different preferences, abilities, and endowments—but makes clear that his theory focuses only on the type of difference presented by the fact of reasonable pluralism. *See* Cohen, *supra* note 33, at 187–88.

plausible premises to fundamentally conflicting public policies.”⁵⁹ Instead, they are likely the stuff of intense emotions such as fear and rage, a longstanding history of frustrated human interests, and a dynamic of distrust in which each side is apt to view the other as the “enemy.”⁶⁰ Deliberative theorists might acknowledge these as empirically unavoidable aspects of conflict, but they do not consider them relevant for how conflict *should* be resolved.⁶¹

Another way of thinking about this is to distinguish between what I shall refer to as “relational” and “conceptual” conflict. Relational conflict suggests a struggle or antagonistic dynamic between human beings.⁶² The dynamic need not manifest itself in competitive or aggressive behavior. It can lurk beneath the surface of civility, as when parties to a dispute avoid dealing with it or do so by bending over backwards in a way that disserves the interests of all. By contrast, conceptual conflict suggests the idea of incommensurable initial premises, divergent interpretations of facts, or irreconcilable arguments.

For deliberative democracy theory, the only relevant or important type of conflict is conceptual conflict. On this view, the real dispute resides at the conceptual level; thus, resolving conceptual tensions through “the logic, the

⁵⁹ AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 74 (2004).

⁶⁰ Terrell A. Northrup, *The Dynamic of Identity in Personal and Social Conflict*, in *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 55, 74 (Louis Kriesberg et al. eds., 1989) (describing a feature of intractable conflict whereby others are dehumanized or viewed as the “enemy”).

⁶¹ See *infra* notes 119–121 and accompanying text.

⁶² IBDR scholars would certainly agree with deliberative theorists that contradictions between comprehensive doctrines contribute to relational conflicts. See generally MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* 15–16 (1973) (providing a typology of conflict that includes conflicts between values and principles); W. BARNETT PEARCE & STEPHEN W. LITTLEJOHN, *MORAL CONFLICT: WHEN SOCIAL WORLDS COLLIDE* (1997) (describing conflict primarily in terms of the clash of value systems or worldviews). But this is just one aspect of conflict. Without denying the role that value pluralism plays in explaining conflict, IBDR focuses primarily on understanding and managing the human, relational, or process aspects of conflict. This orientation appears to be widely shared not just within IBDR but also among dispute resolution theories in general. See, e.g., Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321, 333–42 (2007) (contrasting interest-based, transformative, and narrative mediation but describing all three as assuming a relational or dynamic understanding of conflict rather than a conceptual one).

truth, and the evidence of an argument”⁶³ is presented as the optimal way to dispose of the conflict in its entirety. In large part because of these assumptions about conflict, the deliberative paradigm conveniently brackets the destructive dynamics that are bound to unravel dialogue about controversial issues. In the next section, I explain just how.

C. Conflict Resolution as Epistemology

“Every idea is an incitement.”
—Oliver Wendell Holmes⁶⁴

There are many variants of deliberative democracy theory today. Some veer toward what has been referred to as an “epistemic conception,”⁶⁵ which is perhaps most closely associated with Jürgen Habermas. On this view, deliberation is beneficial because it is the most reliable or accurate method for discerning the common good.⁶⁶ Others conceive of the benefits of deliberation primarily in moral terms—as the “morally optimal basis” of political cooperation among citizens in a democracy.⁶⁷

The deliberative theorists on whom I focus in this article stress the moral conception of deliberation.⁶⁸ Nonetheless, they assume that the type of dialogue that best expresses cooperation and mutual respect within conflict is

⁶³ Amy Gutmann, *The Lure and Dangers of Extremist Rhetoric*, 136 DAEDALUS 70, 72 (2007); see also Cohen, *Deliberative Democracy*, *supra* note 22, at 223 (describing deliberation as a process of appealing “to evidence, or principles, or analogies, or arguably illustrative stories, or other considerations that aim to show why one decision is the right one or the best one”).

⁶⁴ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

⁶⁵ For a particularly lucid account of the epistemic conception, see generally Martí, *supra* note 38.

⁶⁶ See HABERMAS, *supra* note 31, at 475 (describing public discourse as a “rationally motivated . . . attempt to determine what is *right* through a discussion.”) (emphasis added).

⁶⁷ GUTMANN & THOMPSON, *supra* note 29, at 55; see also Cohen, *supra* note 37, at 67–71 (describing the deliberative process as a process of “cooperation” in which deliberators treat each other with respect, equality, and fairness).

⁶⁸ See Cohen, *Deliberative Democracy*, *supra* note 22, at 228–29 (noting that “the intuitive attractions of deliberative democracy derive substantially” from the “intrinsic virtues” of making decisions together in an atmosphere of mutual respect); Thompson, *supra* note 22, at 506 (“[D]eliberative democracy is based on a moral principle of reciprocity . . .”).

“epistemic” in nature, involving rational justification rather than interest-based understanding and problem solving.⁶⁹

A remote but classic example of this epistemic orientation can be found in Alexander Meiklejohn’s model of free speech regulation. Meiklejohn argued that the purpose of a system of free expression is to facilitate collective discussion and decisionmaking in the service of self-government.⁷⁰ But he understood the perils of “unregulated talkativeness.”⁷¹ So he proposed the “traditional American town meeting”—a venue in which dialogue is disciplined by strict adherence to rules of parliamentary procedure—as a model for how best to regulate such a discussion.⁷²

In the ideal town meeting,

debaters must confine their remarks to “the question before the house.” If one man “has the floor,” no one else may interrupt him. . . . If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared “out of order.” . . . And if he persists in breaking the rules, he may be “denied the floor” or, in the last resort, “thrown out” of the meeting.⁷³

David Estlund views Meiklejohn’s town meeting as “a real deliberative forum in which the ideal deliberative situation is realized about as well as we could expect to find anywhere.”⁷⁴ If this is true, what is conspicuously absent from the architecture of the deliberative ideal is any account of relational conflict.

Meiklejohn’s primary concern was to preserve the epistemic integrity of deliberation—to guard against what he referred to as the “mutilation of the *thinking* process.”⁷⁵ By enforcing something like “Robert’s Rules of

⁶⁹ See, e.g., Cohen, *Deliberative Democracy*, *supra* note 22, at 227 (describing the epistemic conception of deliberation as one of three important justifications for deliberative democracy).

⁷⁰ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1965).

⁷¹ *Id.* at 26.

⁷² *Id.* at 23.

⁷³ *Id.* at 24–25.

⁷⁴ David Estlund, *Democracy and the Real Speech Situation*, in *DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS*, *supra* note 38, at 75, 77. Estlund does not endorse the deliberative ideal as always appropriate for political dialogue in the real world. See *id.* at 78–79. See generally David M. Estlund, *Deliberation Down and Dirty: Must Political Expression be Civil?*, in *THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN AMERICAN DEMOCRACY* 49 (Thomas R. Hensley ed., 2001).

⁷⁵ MEIKLEJOHN, *supra* note 70, at 27 (emphasis added).

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

Order,”⁷⁶ Meiklejohn believed it was both possible and desirable to sever relational conflict from conceptual conflict. He therefore assumes that relational conflict is nothing more than static noise; a distraction. The heart of the matter is the conceptual conflict, which is best resolved by disciplining the thinking process: by ensuring that everyone speak in turn and stick to the point.

From an IBDR perspective, however, matters of public interest and governance elicit powerful emotions and implicate basic human needs. The resulting conflicts cannot adequately be dealt with by insisting that everyone follow Robert’s Rules.⁷⁷ This is not just because the Rules may actually exacerbate those conflicts,⁷⁸ but also because the Rules repress the very dynamics that IBDR believes are no less important than the evidence and arguments.

Similar assumptions about conflict can be observed in the work of Cass Sunstein, who was himself influenced by Meiklejohn.⁷⁹ Sunstein takes the fact of reasonable pluralism to heart by arguing that a major purpose of American constitutionalism is to foster dialogue “among people who are genuinely different in their perspectives and position.”⁸⁰ Like other deliberative democrats, he rejects Joseph Schumpeter’s cynical prediction that democratic dialogue only leads to relational conflict in the form of “deadlock,” “interminable struggle,” and “increasing irritation.”⁸¹ Instead, he follows Alexander Hamilton’s optimism that “differences of opinion” and “the jarring of parties” will enrich and enliven deliberation.⁸² As Sunstein put

⁷⁶ See generally HENRY M. ROBERT, POKET MANUAL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES (1887) (setting forth rules of parliamentary procedure for use in civil associations).

⁷⁷ In a similar vein, Lawrence Susskind had observed that Robert’s Rules of Order are not well-suited to the goals of consensus building and problem-solving negotiation. See generally Lawrence Susskind, *Breaking Robert’s Rules*, 22 NEGOTIATION J. 351, 351–53 (2006).

⁷⁸ See *infra* Part III.A.

⁷⁹ See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232 (1993) (tracing his “New Deal” for speech to the work of Alexander Meiklejohn). Sunstein parts company with Meiklejohn on the issue of whether non-political speech deserves the same protection under the First Amendment as political speech. *Id.* at 388–89 n.2. But this disagreement does not affect the point I seek to make here.

⁸⁰ CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241 (1993).

⁸¹ SCHUMPETER, *supra* note 43, at 255–56.

⁸² THE FEDERALIST NO. 70, at 425 (Alexander Hamilton) (Clinton Rossiter ed., 2003) [hereinafter THE FEDERALIST]. See SUNSTEIN, *supra* note 80, at 241 (arguing that diversity and heterogeneity of opinion are “creative and productive forces”); *id.* at 22 (noting that the Madisonian conception of government “envisages a high degree of heterogeneity as a precondition for political deliberation.”).

it rhetorically: "If people already agree, what will they talk about? Why would they want to talk at all?"⁸³

These observations about the merits of heterogeneity, shared by other deliberative theorists,⁸⁴ are undoubtedly correct in a variety of contexts. But from an IBDR standpoint, heterogeneity invites its own set of concerns—concerns that appear in sharp relief when Sunstein's questions are posed from the opposite direction: If people *disagree*, perhaps vehemently, what will they talk about (at least in a manner that accords with standards of reasoned deliberation)? And would they even want to talk at all? Like other deliberative theorists, Sunstein avoids these questions in large part because his template for deliberative interaction is something roughly like the orderly New England town meeting, where relational conflicts have successfully been banished (through enforcement of Robert's Rules) or are imagined not to exist.

To be sure, Sunstein has noted that "[s]ometimes people really disagree" and that discussion can "produce intense differences."⁸⁵ But he seems to consider such intractable disputes to lie outside the mandate of deliberative theory.⁸⁶ In a similar vein, Gutmann and Thompson acknowledge that more deliberation may actually increase conflict by "creating occasions for high-minded statements, unyielding stands, and no-holds-barred opposition."⁸⁷ But rather than shake their confidence in the value of continued deliberation, this only leads them to frame the problem as one of irresponsible *deliberators*—"moral fanatics" whose claims can anyhow be "combated" through the inherently stable process of reasoned argument.⁸⁸

The deliberativist might respond here by arguing that diversity and disagreement, far from producing relational conflict, actually improves the quality of discourse by guarding against the hazards of "ideological amplification."⁸⁹ Ideological amplification is the widely-reported

⁸³ SUNSTEIN, *supra* note 80, at 242.

⁸⁴ See, e.g., Martí, *supra* note 38, at 29 n.3 (noting that "disagreements in general [reasonable and unreasonable] contribute to the quality of deliberation").

⁸⁵ SUNSTEIN, *supra* note 80, at 247.

⁸⁶ See *id.* at 247 (conceding that the "deliberative process will not bring [parties who differ intensely] together" and that such cases will lead "at best to compromises among competing positions").

⁸⁷ GUTMANN & THOMPSON, *supra* note 29, at 44.

⁸⁸ *Id.* By blaming the "fanatic" for the conflict, Gutmann and Thompson end up violating one of the fundamental (but sometimes criticized) principles of Fisher & Ury's model of interest-based bargaining: "Separate the people from the problem." See FISHER ET AL., *supra* note 6, at 17–39.

⁸⁹ See David Schkade et al., *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915, 917 (2007). Ideological amplification is an instance of the "broader phenomenon of

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

phenomenon whereby our preexisting ideological tendencies are pushed in more extreme directions after discussion with like-minded individuals. Sunstein and his collaborators replicated this phenomenon in an experiment involving sixty pre-screened liberal and conservative Colorado residents.⁹⁰ The subjects were placed in attitudinally homogeneous groups of six—liberals with other liberals, conservatives with other conservatives—and asked to discuss and reach consensus on three highly controversial issues: same sex civil unions, affirmative action, and global warming. Consistent with the results of extant empirical research, Sunstein and his colleagues found that the groups generally “polarized”: After discussion with like-minded group members, liberal participants shifted further to the left, and conservative participants further to the right, of their pre-deliberation judgments.⁹¹ These findings lead Sunstein and his colleagues to conclude that when “like-minded people wall themselves off from alternative perspectives,” “widespread error and social fragmentation are likely to result.”⁹² For this reason, they advocate deliberation within “a large and heterogeneous public sphere.”⁹³

Sunstein and his colleagues did not, however, mix liberal and conservative subjects within the same group—that is, they did not attempt to study the effects of relational conflict on deliberation over hot-button political issues. Nonetheless, they appear confident that such heterogeneous groups would *depolarize* (i.e., shift toward a median point between the left and right extremes)⁹⁴ or, at minimum, would *not* polarize (because liberals

group polarization,” Cass R. Sunstein, *Ideological Amplification*, 14 CONSTELLATIONS 273, 274 (2007), which has been observed in numerous studies nationally and internationally.

⁹⁰ See Schkade et al., *supra* note 89, at 916–17.

⁹¹ See *id.* at 917.

⁹² Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 105 (2000) [hereinafter Sunstein, *Deliberative Trouble*]; see also Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 186 (2002) [hereinafter Sunstein, *Group Polarization*].

⁹³ Sunstein, *Deliberative Trouble*, *supra* note 92 at 105; see also Sunstein, *Group Polarization*, *supra* note 92, at 186. Sunstein and his colleagues are not uniformly opposed to deliberating in homogeneous enclaves. Enclave deliberation may be good for democracy insofar as it provides a discursive space for minority groups to develop and articulate opposing voices—voices that may be drowned out in larger group deliberation dominated by powerful majorities. See Sunstein, *Deliberative Trouble*, *supra* note 92, at 76, 105–06, 111–13; see also Sunstein, *Group Polarization*, *supra* note 92, at 186–87, 190–91.

⁹⁴ See Sunstein, *Group Polarization*, *supra* note 92 at 181 (arguing that “[d]epolarization, rather than polarization, will . . . be found when the relevant group

would not be convinced of conservatives' arguments and *vice versa*) after deliberation.⁹⁵ Why? The explanation they offer is that members of heterogeneous groups will become exposed to a wider range of arguments on both sides, which in turn will produce better, more balanced judgments.⁹⁶ Diversity, in other words, has epistemic value—it guards against the “mutilation of the thinking process” that Meiklejohn so feared.

But what is the evidence that ideologically heterogeneous groups do in fact depolarize or stay put rather than splinter into more conflict? The studies cited by Sunstein and his colleagues are not entirely persuasive because they reported clear instances of depolarization only where groups were asked to make hypothetical assessments about risk or punishment, not when they were asked to agree about difficult social and political conflicts.⁹⁷ Tellingly, these studies found depolarization to be greatest where the subjects of discussion were “obscure matters of fact (for example, how far below sea level is the town of Sodom)”⁹⁸ or matters of personal taste, but least where they involved

consists of individuals drawn equally from two extremes”); *see also* Sunstein, *Deliberative Trouble*, *supra* note 92, at 92–93 (2000).

⁹⁵ *See* Schkade et al., *supra* note 89, at 929. Sunstein suggests that this may be particularly likely where “subgroup members have fixed positions” and they “know that they are members of identifiable groups, and that their co-discussants are members of different identifiable groups.” Sunstein, *Deliberative Trouble*, *supra* note 92, at 94.

⁹⁶ *See* Sunstein, *Deliberative Trouble*, *supra* note 92, at 104–08; *see also* Sunstein, *Group Polarization*, *supra* note 92, at 186–89.

⁹⁷ The bulk of these studies, conducted by Eugene Burnstein and his colleagues, focused on one species of group polarization known as the “risky shift” phenomenon. *See, e.g.,* Amiram Vinokur & Eugene Burnstein, *Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts*, 29 J. PERSONALITY & SOC. PSYCHOL. 305 (1974). Here, the focus of investigation is not the subject’s ideological commitments but rather his or her assessment of hypothetical risks. *Id.* at 306. The subject is presented with a scenario in which a choice must be made between a safe but mediocre outcome and a risky but potentially optimal outcome. *Id.* He or she is asked to determine the minimum probability of success that he or she would accept in order to recommend the risky option. *Id.* He or she is then brought into a group that must collectively determine the minimum probability that the group as a whole would accept in order to endorse the risky option. *Id.* This is a far cry from issues such as same-sex unions and affirmative action.

Ironically, Burnstein and his colleagues found that deliberation itself bears *no necessary relationship* to polarization or depolarization because the same risky shifts can be observed by exposing subjects to persuasive arguments from written sources, without the opportunity to discuss those arguments in a group. This leads the researchers to conclude, unlike Sunstein, that deliberation is largely unimportant. *See id.* at 314.

⁹⁸ Sunstein, *Deliberative Trouble*, *supra* note 92, at 93.

“long-familiar, much debated issues (including capital punishment).”⁹⁹ The explanation offered for this difference by the original experimenters (and endorsed by Sunstein and his colleagues) is that familiar issues do not depolarize easily because the arguments on both sides have long been in circulation and the public has already formed “rigidly determined positions” based on them.¹⁰⁰ Further deliberation is therefore unlikely to change the epistemic horizon—that is, to yield new arguments or insights that might help us better resolve conflicts at a conceptual level.

But the IBDR literature would suggest another explanation: These issues do not depolarize easily because it is impossible to talk about them without producing relational conflict. On this view, depolarization is not so much a function of how well the arguments have been vetted on both sides; rather, it is more a function of how closely the arguments collude (wittingly or not) with deeper needs and interests, such that threats to the validity of our arguments are perceived as threats to the fulfillment of those interests.¹⁰¹

This explanation is in fact corroborated by Sunstein’s own observation that experimental subjects tend not to be convinced by those whom they perceive as their opponents or as out-group members.¹⁰² If you do not appear to share my interests and values, Sunstein explains, I am “less likely to be moved” by your arguments.¹⁰³ But in situations of conflict, it is rare to perceive one’s counterpart as anything *but* an outsider or an opponent.¹⁰⁴ Sunstein does not consider seriously this possibility and its implications for deliberation because, like other deliberative democrats, he focuses on

⁹⁹ ROGER BROWN, *SOCIAL PSYCHOLOGY: THE SECOND EDITION* 226 (1986) (reviewing Burnstein’s research); see also Sunstein, *Deliberative Trouble*, *supra* note 92, at 93.

¹⁰⁰ See Schkade et al., *supra* note 89, at 929; see also Sunstein, *Deliberative Trouble*, *supra* note 92, at 93. As Roger Brown explains, in such circumstances “[t]here is nothing new to be learned in group deliberation.” BROWN, *supra* note 99, at 226.

¹⁰¹ See *infra* Part III.B for a discussion of the relationship between conflict and human interests.

¹⁰² See Sunstein, *Deliberative Trouble*, *supra* note 92, at 91–92; Sunstein, *Group Polarization*, *supra* note 92, at 181 (“[P]eople are less likely to shift if the direction advocated is being pushed by unfriendly group members; the likelihood of a shift, and its likely size, are increased when people perceive fellow members as friendly, likeable, and similar to them.”).

¹⁰³ Sunstein, *supra* note 89, at 276.

¹⁰⁴ See DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 134–36 (3d ed. 2004) (surveying research indicating that conflict escalation may be more common among individuals who do not see themselves as sharing a common group membership than among those who do).

conceptual conflict in isolation without situating it in the larger context of relational conflict.¹⁰⁵

III. INTEREST-BASED DISPUTE RESOLUTION'S ORIENTATION TO CONFLICT

My goal in the previous Part was to outline deliberative democracy's orientation to conflict. Deliberative theorists explain conflict in conceptual terms—as a product of diverse values, principles, or comprehensive doctrines colliding with one another in a larger matrix of reasonable pluralism. Not surprisingly, their response to conflict is to advocate a cooperative, respectful, but largely intellectual process designed “to show why one decision is the right one or the best one.”¹⁰⁶

But what if the dynamic of human conflict distorts the very process of persuasion and reason-giving? What if conflicts are driven more by inexorable needs and interests than by muddled thinking or unsound justifications? In that case, perhaps questions about legitimacy and correctness—while certainly important—should take a back seat to the enterprise of understanding and accommodating those needs and interests.

That, in a nutshell, is what I am proposing as IBDR's orientation to conflict. In this Part, I first describe the key challenge of relational conflict: its propensity to trap us in unconstructive patterns or dynamics. I then turn to the role of needs and interests.

A. *The Dynamics of Conflict*

“So strong is this propensity of mankind to fall into mutual animosities, that . . . the most frivolous and fanciful distinctions have been sufficient to . . . excite their most violent conflicts.”

—James Madison¹⁰⁷

¹⁰⁵ Sunstein tries to get around this issue by defining exceptionally large associations and publics as the relevant “group.” See Sunstein, *Group Polarization*, *supra* note 92, at 186 (advocating deliberation “within a large and heterogeneous public sphere”). Thus, he asks us to “imagine a deliberating body consisting of all citizens in the relevant group; this may mean all citizens in a community, a state, a nation, or the world.” Sunstein, *Deliberative Trouble*, *supra* note 92, at 109. But given the fact of reasonable pluralism and existing social inequalities, any such large-scale deliberating body is likely to be completely fractured along multiple in- and out-group divisions.

¹⁰⁶ Cohen, *Deliberative Democracy*, *supra* note 22, at 223.

¹⁰⁷ THE FEDERALIST NO. 10 (James Madison), *supra* note 82, at 64.

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

Relational conflict is as inevitable as it is ubiquitous, and it presents special challenges for attempts to foster constructive dialogue in the public sphere. As public consensus building scholar Judith Innes observes: "Conflict is ever present throughout a consensus building process. Stakeholders grow angry, threaten to leave, and are constantly aware of the fundamentally different interests that separate them and the conflicting strategies their constituencies have traditionally followed."¹⁰⁸

Several empirical studies have underscored at least two salient ways in which conflict dynamics interfere with dialogue about matters of public concern.¹⁰⁹ First, deliberation in the real world appears to be ineffective at containing relational conflict and, more often than not, can make it worse. Tali Mendelberg and John Oleske found this to be the case in their comparison of an all-white and a racially integrated (whites and non-whites) town meeting convened to discuss school desegregation.¹¹⁰ In the all-white group (which generally favored segregation), the researchers found minimal conflict, arguments clothed in the language of common good and community, and the avoidance of threatening issues, such as the group's own internal dissensus and potentially racist attitudes.¹¹¹ In the integrated group, by contrast, they observed conflict, antagonism, and alienation.¹¹² Arguments that had been viewed in the all-white group as "nonracial and well-reasoned" were seen in the integrated group "as racial and poorly reasoned."¹¹³ Non-whites became "angry and defensive" at what they perceived as the white participants' obvious racism, which the whites in turn vigorously denied.¹¹⁴

¹⁰⁸ Judith E. Innes, *Consensus Building: Clarifications for the Critics*, 3 PLANNING THEORY 5, 13–14 (2004); see Lisa Blomgren Bingham et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547, 551 (2005) (noting that "[c]onflict among interested parties occurs in almost all public decision making, policy making, implementation, and enforcement"). See generally LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987) (observing the pervasiveness of conflict in city planning processes).

¹⁰⁹ See generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* 183–208 (2002) (describing extant empirical research).

¹¹⁰ See generally Tali Mendelberg & John Oleske, *Race and Public Deliberation*, 17 POL. COMM. 169 (2000).

¹¹¹ See *id.* at 176–82.

¹¹² *Id.* at 182–86.

¹¹³ *Id.* at 186.

¹¹⁴ *Id.* at 185.

The authors concluded that, in the integrated group, there was little or no mutual understanding and the quality of deliberation was poor.¹¹⁵

Second, because “most people do not react well when confronted with opposing views,”¹¹⁶ deliberation is also prone to the opposite phenomenon: Controversial issues are hardly ever raised, divisive voices are silenced, and conflict is generally avoided rather than dealt with constructively. Jane Mansbridge corroborates this point in her path-breaking study of town meetings held in a 350-resident municipality in Vermont. She sums up the problem as follows:

Some people do not attend meetings because they know in advance that they will get upset. If they do attend, they may still need the support of a faction before they can find courage enough to enter the fray. They may hold back what they have to say until they lose control and become too angry to listen. Fear of conflict leads those with influence in a meeting to suppress important issues rather than letting them surface and cause disruption. It leads them also to avoid the appearance of conflict by pressing for unanimity.¹¹⁷

Instead of deliberation, Mansbridge found that most citizens prefer “adversary” processes such as secret ballots when they are forced to deal with contentious issues.¹¹⁸

The deliberative theorist’s traditional response to these and similar studies is to claim that they are inconclusive because the discursive practices observed were somehow imperfectly deliberative—for instance, because they amounted to nothing more than “everyday talk,” or because they otherwise failed to meet one of the stringent standards of deliberative reason-giving.¹¹⁹ Some deliberative theorists go so far as to argue that no end of empirical data can cast doubt on their normative project. The whole point of deliberative theory, they explain, is to advocate what politics *should* be, not how it is now.¹²⁰ Thus, even if the ideal conditions of deliberation can never be

¹¹⁵ André Bächtiger and his colleagues reached similar conclusions. See André Bächtiger et al., *Deliberation in Legislatures: Antecedents and Outcomes*, in DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN?, *supra* note 3, at 82, 82 (finding that deliberation improves when, among other things, issue polarization is low).

¹¹⁶ See HIBBING & THEISS-MORSE, *supra* note 109, at 202.

¹¹⁷ JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 34 (1983).

¹¹⁸ See *id.*

¹¹⁹ Thompson, *supra* note 22, at 502.

¹²⁰ This view, as Thompson describes it, is that “[t]heory challenges political reality. It is not supposed to accept as given the reality that political science purports to describe

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

implemented in practice—because of human irrationality, relational conflict, or power differentials—this does not negate the value of striving for such ideals as best we can. For the ideals serve as a standard of criticism; they show us what is lacking in our current political arrangements and encourage us to become better than we are.¹²¹

If deliberative democracy theory is idealistic in this way, IBDR chooses instead to be pragmatic: Conflict resolution must be broadened to address the unavoidable and undeniable dynamic aspects of conflict, such as those identified by Mansbridge, Mendelberg & Oleske, and others. It cannot and should not be limited to a purely conceptual process of argumentation. In other words, conceptual conflict is not severable from relational conflict. How well we cope with relational conflict affects how well we are able to reason about conceptual conflict. There are at least two reasons why.

First, relational conflict is not a mere adjunct of conceptual conflict, such that resolving the latter is sufficient or even optimal for resolving the former. Instead, on the IBDR view it is a function of frustrated human needs and interests. The goal becomes to achieve a pragmatic accommodation of those interests rather than to justify why some proposed outcomes are “right” and others “wrong.”¹²²

Second, relational conflict traps people in ways they do not realize and takes on a life of its own. Robert Baruch Bush and Sally Ganong Pope describe this phenomenon, widely reported by conflict resolution professionals, in the following way:

[N]o matter how strong a person is, conflict propels them into relative weakness. No matter how considerate of others a person is, conflict propels them into self-absorption, self-centeredness. None of this occurs because human beings are ‘defective’ in any way. It is rather because conflict has

and explain. It is intended to be critical, not acquiescent.” *Id.* at 499; see also Joshua Cohen & Joel Rogers, *Power and Reason*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, *supra* note 3, at 237, 249 (concluding that if the preconditions for realizing the ideal of deliberation in practice do not exist, “we have a problem in the circumstances, not in the ideal that condemns them.”).

¹²¹ See Chambers, *supra* note 37, at 308.

¹²² Thus, in what he refers to as “deep-rooted conflict[s],” John Burton argues that the goal of conflict resolution is to “solve the problem without attributing blame.” JOHN BURTON, *CONFLICT: RESOLUTION AND PREVENTION* 28 (1990). “‘Right’ and ‘wrong’ as defined by traditional norms, become limited in their meaning.” *Id.*

this power to affect our experience of ourselves and others, in virtually every context in which conflict occurs.¹²³

These dynamics, in turn, make reasoning within conflict extremely difficult. In short, conflict exerts a centrifugal force on discourse. It distorts the very process of giving and testing reasons that is the hallmark of deliberation. Drawing on research from other disciplines (especially psychology), IBDR scholars have identified a number of reasons why.

In conflict, disputants cleave to rigid, inflexible positions.¹²⁴ Each is convinced that it is right and the other is wrong.¹²⁵ Discussion quickly polarizes into “black or white, for or against, good or evil.”¹²⁶ A zero-sum mindset, in which each side perceives a gain to the other as a loss to itself, can turn the conversation into an adversarial struggle to win an argument rather than deepen understanding¹²⁷

¹²³ Bush & Pope, *supra* note 1, at 74; *see id.* at 77 (referring to conflict as a negative interaction that “entrap[s]” disputants); *see also* GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 11, 53 (2008) (defining “conflict trap” and explaining that “[d]isputants are often trapped within their conflict in ways they simply do not understand.”).

Bush and Pope—who would likely see their work as falling only partly within the IBDR umbrella, *see* note 1, *supra*—argue that the “crisis” in human interaction that almost always accompanies conflict means that conflict intervention “cannot *only* be about [interest-based] problem solving”; instead, it must also address these relational and interactive rifts. *See* Bush & Pope, *supra* note 1, at 73 (emphasis added); *see id.* at 72 n.7. If this is meant to suggest that IBDR focuses “only” on interest maximization at the expense of addressing the dynamics of conflict, I disagree. Many of the most influential works emerging out of the IBDR tradition also highlight the toxicity of conflict and suggest better ways for disputants to relate to one another. They just do so in ways that are not always consistent with transformative theory. *See generally* FRIEDMAN & HIMMELSTEIN, *supra* note 123; DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (2000); WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1993).

¹²⁴ *See* Morton Deutsch, *Prevention of World War III: A Psychological Perspective*, 4 POL. PSYCHOL. 3, 11 (1983); Northrup, *supra* note 60, at 62.

¹²⁵ *See* FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 106; STONE ET AL., *supra* note 123, at 6 (arguing that conflict both creates, and is created by, a framing of the problem in terms of right and wrong).

¹²⁶ Deutsch, *supra* note 124, at 13; *see also* Dean G. Pruitt, *Mediation at the Millennium*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 395, 405–06 (Margaret S. Herrman ed., 2006) (describing polarization as one of four stages in the escalation of conflict).

¹²⁷ *See* Morton Deutsch, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 43, 58 (Morton Deutsch et al. eds., 2d ed., 2006)

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

Disputing parties systematically fail to empathize with, and listen carefully to, each other.¹²⁸ If they listen at all, it is more often in order to identify errors and weaknesses, not in order to better understand divergent perspectives.¹²⁹ Empirical studies show that parties in conflict unwittingly seek evidence that supports their interests and ignore or dismiss inconvenient evidence that does not.¹³⁰ In this way, initial negative attitudes become reified and virtually immune to falsification.¹³¹ Some researchers have even argued that in conflict, the reason-giving process itself comes to be instrumentalized and steered largely by pre-given interests.¹³²

(“[T]he conflicting parties often lose sight of the actual interests underlying their respective positions and the conflict becomes a win-lose one . . .”).

¹²⁸ See, e.g., STONE ET AL., *supra* note 123, at 166–67; Robert M. Krauss & Ezequiel Morsella, *Communication and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 127, at 144, 150.

¹²⁹ See FISHER ET AL., *supra* note 6, at 33 (noting how often negotiators fail to listen because they are “so busy thinking about what . . . [to] say next” or “how . . . [to] respond to that last point”); Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 296 (2006) (observing that when lawyers are asked in mediation to identify weaknesses in their own case, they do so only to refute the weaknesses, not to understand them better); Diana C. Mutz, *Mechanisms of Momentum: Does Thinking Make it So?* 59 J. POL. 104, 107 (1997) (concluding that in conflict, we are “most likely to generate counterarguments defending [our] initial position” and not seek to understand contrary opinions).

¹³⁰ See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 132–33 (1954) (concluding from experimental data that a person selects what he or she wishes to see based on his or her “purposes” or interests); Sheila Heen & Douglas Stone, *Perceptions and Stories*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 343, 346 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006); see also Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 27–28 (1999) (summarizing selected findings on biased assimilation).

¹³¹ Pruitt and Kim refer to this as “selective information processing.” PRUITT & KIM, *supra* note 104, at 156–57. A related phenomenon is the so-called “self-fulfilling prophesy”: Negative biases about the other lead us to act in distrustful or aggressive ways that elicit reciprocal behavior from the other, which in turn confirms our initial biases and perpetuates the cycle of conflict. See *id.* at 154–55.

¹³² The almost irresistible tendency to reason backwards from self-interested goals, also referred to as “motivated reasoning,” has been widely observed. See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990). This is especially so in conflict, where accuracy concerns typically give way to a desire to prevail or to be proven right. See Alison Ledgerwood et al., *Changing Minds: Persuasion in Negotiation and Conflict Resolution*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 127, at 455, 468–69 (suggesting that, in conflict situations, we are less likely to weigh information and arguments evenhandedly and more likely to interpret them in ways that support a “desire to dismiss, resist, and reject an

Social-psychological biases compound the problem of conflict.¹³³ For example, according to the widely-acknowledged “fundamental attribution error,” we are prone to believe that bad acts caused by others result from free choice, while the same bad acts caused by ourselves result from circumstances beyond our control.¹³⁴ Similarly, when our opponent’s statements impact us in a negative way, we impute a correspondingly negative intention even though there is no logical connection between a speaker’s intention and the effect his or her words have on us.¹³⁵ Empirical studies have confirmed time and again that we are not just hard-wired to favor our own or our group’s interests, but that we believe our biased interpretations reflect an objective reality.¹³⁶ Because of this “naïve realism,”

opponent’s overtures”); see also Jonathan Haidt & Sara Algoe, *Moral Amplification and the Emotions that Attach Us to Saints and Demons*, in HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY 324 (Jeff Greenberg et al. eds., 2004) (arguing that in conflicts, people have “already chosen the conclusion they wish to reach”).

A related body of research has found that we are especially prone to draw self-interested conclusions if the evidence is ambiguous or can be interpreted in multiple ways. See, e.g., Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 ORG. BEHAV. & HUM. DECISION PROCESSES 122, 122–29 (1996).

¹³³ A number of these biases have also been identified as “barriers” to negotiation. See Korobkin, *supra* note 129, at 298–308 (discussing fundamental attribution error as a “psychological impediment” to mediation success). Here, I focus specifically on those barriers that are acute in contentious or conflictual circumstances.

¹³⁴ Thus, if a friend is late for an appointment, we begin from the premise that he or she is irresponsible or does not care, but if we are late for the same appointment, we attribute our failure to external factors such as the weather or traffic. See Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 22–24 (1995) (providing an intellectual history of what the authors refer to as “correspondence bias”). This tendency to view the same conduct as blameworthy in others but innocent in oneself sets the stage for conflict. See Keith G. Allred, *Anger and Retaliation in Conflict: The Role of Attribution*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 127, at 236, 240, 243–49 (arguing that dispositional attributions cause emotional reactions that can fuel conflict behaviors).

¹³⁵ See FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 99–100 (noting the propensity of disputing parties to judge themselves by their good intentions and others by the bad impact that their opponents’ actions have on them); STONE ET AL., *supra* note 123, at 44–57 (noting how our tendency incorrectly to judge others’ intentions by the effect of their words or actions on us exacerbates conflict).

¹³⁶ These psychological tendencies can be heightened in conflict situations. See PRUITT & KIM, *supra* note 104, at 157 (“In conflict, it appears, reality is all too often in the eye of the beholder.”). See generally Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103 (Edward S. Reed et al. eds., 1996) (describing naïve realism and the way it can complicate conflict situations).

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

when others disagree with us, we view them as having failed to grasp what is “right,” “reasonable,” or “true”—because they labor under deficient information or analysis, because their motives are invidious, or because they are simply irrational.¹³⁷ These biases are both aggravated by, and further aggravate, conflict.

For these and other reasons, attempts to rationalize or justify our positions are typically unconvincing to our opponents and are likely to be counterproductive.¹³⁸ A “good argument” to one side is seen by the other “as further proof that the speaker was mad, bad, or sick.”¹³⁹ What we intend as an explanation or a justification risks being interpreted by others as an

In a famous experiment, Albert Hastorf and Hadley Cantril studied biased perceptions of an unusually aggressive and much debated football game between rivals Princeton and Dartmouth. After reviewing a film recording of the match, Princeton students identified twice as many infractions by Dartmouth players than by Princeton players—an observation that was consistent with Princeton’s perception that their opponents had used dirty tactics. By contrast, Dartmouth students watching the same film identified roughly the same number of infractions by both teams. From these results, the researchers concluded that the same sensory data are interpreted differently by different people depending on their purposes and interests. It is not simply that we have different attitudes toward the same underlying thing (the game). Instead, what the thing “really” is depends on whom you ask. See Hastorf & Cantril, *supra* note 130, at 132–33.

¹³⁷ Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, 27 ADV. EXPERIMENTAL SOC. PSYCHOL. 255, 278–79 (1995).

¹³⁸ See PRUITT & KIM, *supra* note 104, at 68 (observing that “the skill required for successful persuasive argumentation should not be underestimated. Party must convince Other to surrender something that it holds dear and that Party covets. . . . This is a tall order in a contentious encounter.”); Deutsch, *supra* note 127, at 58. This conclusion is supported by empirical studies demonstrating, contrary to the studies reported by Sunstein and his colleagues, that attitude change is extremely difficult and unlikely in situations of conflict. For example, Lee Ross and his colleagues found that proponents and opponents of the death penalty who read the same mix of pro- and anti-death penalty articles systematically judged the articles that supported their point of view to be well argued and those that did not to be unpersuasive. See generally Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSON. & SOC. PSYCHOL. 2098 (1979). Instead of revising their views or coming to see capital punishment as a complex issue with arguments on both sides, access to further information only led to more polarization. See *id.* at 2105; see also Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSON. & SOC. PSYCH. 1037, 1037–49 (1980) (finding that in conflict situations, test subjects continued to defend a speculative conclusion based on meager evidence even when it was later shown that the evidence had been completely fabricated).

¹³⁹ PEARCE & LITTLEJOHN, *supra* note 62, at 11–12.

attack.¹⁴⁰ This can lead to a “conflict spiral,” in which each side views the other as the original antagonist and its own moves as mere defensive tactics.¹⁴¹ Concepts such as “justice” or “right,” even when used sincerely, can harden positions and unnecessarily inflate the conflict into a question of morality or principle.¹⁴² Worse, it can lead some parties to refuse to engage for fear that the mere act of broaching a dialogue will “legitimize” the other.¹⁴³ These behaviors can add fuel to the fire by leaving real concerns unheard and unaddressed.

In order to identify, analyze, and manage these complex dynamics of human conflict, consensus building processes such as those used by Search for Common Ground¹⁴⁴ and the Public Conversations Project¹⁴⁵ are highly structured. They are typically preceded by extensive preparation, which includes analyzing the background of the dispute (also referred to as a “conflict assessment”), coaching disputants in negotiation, conflict

¹⁴⁰ See URY, *supra* note 123, at 8 (arguing that it is a “mistake” to seek to defend oneself or to reason with an opponent in a conflict situation); see also STONE ET AL., *supra* note 123, at 27 (“If the other person is stubborn, we assert harder in an attempt to break through whatever is keeping them from seeing what is sensible. . . . But instead, our persistence leads to arguments.”).

¹⁴¹ PRUITT & KIM, *supra* note 104, at 96–98. As Pruitt and his colleague Paul Olczak explain:

[N]ew grievances are constantly being added to the original set of issues As these grievances mount up, they contribute to . . . a sense of hopelessness about reforming the other’s thinking and motivation. As a result, it seems even more necessary to employ heavy-handed tactics aimed at changing the other party’s behavior.

Dean G. Pruitt & Paul V. Olczak, *Beyond Hope: Approaches to Resolving Seemingly Intractable Conflict*, in CONFLICT, COOPERATION AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH 59, 64 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995).

¹⁴² See Deutsch, *supra* note 1247, at 58; see also Gabriella Blum & Robert H. Mnookin, *When Not to Negotiate*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR, *supra* note 130, at 101, 110 (“We have often observed a tendency by parties to a conflict to place undue emphasis on the moral dimensions of the conflict while underestimating the importance of more tangible interests.”).

¹⁴³ See LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES 27 (1996); Blum & Mnookin, *supra* note 142, at 108.

¹⁴⁴ See generally Search for Common Ground Homepage, <http://www.sfcg.org> (last visited Jun. 24, 2009).

¹⁴⁵ See generally Public Conversations Project, <http://www.publicconversations.org> (last visited Jun. 24, 2009).

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

resolution, and active listening skills, and persuading relevant stakeholders to participate.¹⁴⁶ In addition, most experts agree that a facilitator trained in conflict resolution is essential in order to foster a safe environment in which dialogue can proceed free of the trappings of conflict.¹⁴⁷ For example, after a workshop on abortion that brought together pro-life and pro-choice supporters, one participant confided that he would not attend a similar workshop without a facilitator because it was simply “too difficult to talk about such emotional issues without some guidance.”¹⁴⁸

In the face of intractability, deliberative theory urges us to continue the conversation with the hope that it might help us discover previously overlooked bits of information or arguments about the merits of a claim, or at least serve as a way of expressing mutual respect and a willingness to cooperate.¹⁴⁹ But the accumulated wisdom of IBDR is that even with the best of intentions, we frame issues in positional or win-lose terms, fail to listen,

¹⁴⁶ See Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 99, 101 (Lawrence Susskind et al. eds., 1999). See generally Margaret Herzig, *Starting a New Conversation*, *DISP. RESOL. MAG.* 10, 11–12 (Summer 1998) (outlining the Public Conversation Project’s pre-meeting procedures, which includes conflict assessments and preparing participants for dialogue). Depending on the complexity of the dispute, this preliminary groundwork can take many months and is typically conducted by highly skilled professionals. See, e.g., Michael L. Poirier Elliott, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT*, *supra* note 146, at 199, 206 (noting that in one case, it took eight months of preparation before proper deliberation could begin).

¹⁴⁷ See BURTON, *supra* note 122, at 7 (arguing that a problem solving approach to conflict “requires” a skilled third party facilitator); MARGARET HERZIG & LAURA CHASIN, *FOSTERING DIALOGUE ACROSS DIVIDES: A NUTS AND BOLTS GUIDE FROM THE PUBLIC CONVERSATIONS PROJECT* 3 (2006) (stating that in conflict situations “characterized by distrust, animosity, stereotyping, and polarization,” effective dialogue is difficult in the absence of a skilled facilitator); Innes, *supra* note 108, at 8 (arguing that “for groups of any significant size addressing a major and complex controversy,” any consensus building effort would require a “skilled and trained facilitator”); Herbert C. Kelman, *Social-Psychological Dimensions of International Conflict*, in *PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES* 61, 78 (I. William Zartman ed., rev. ed. 2007) (predicting that conflicts are unlikely to be contained in the absence of “skillful diplomacy” and “third-party intervention”).

¹⁴⁸ Michelle LeBaron & Nike Carstarphen, *Finding Common Ground on Abortion*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT*, *supra* note 146, at 1031, 1044 (reporting that facilitators were “key to the success of the workshops”).

¹⁴⁹ See GUTMANN & THOMPSON, *supra* note 29, at 43, 73; *supra* notes 94–97 and accompanying text.

and succumb to negative socio-psychological biases.¹⁵⁰ From an IBDR standpoint, the task is not to continue the same conversation but rather to start a new one—one that addresses human needs and interests. In the next section, I explain why.

B. Negotiating Over Interests

“Conflicts of value go with being human. The reason is not that human beings have rival beliefs about the good life. . . . It is that human needs make conflicting demands. The idea of a human life that is without conflicts of value runs aground on the contradictions of human needs.”

—John Gray¹⁵¹

A stable, but by no means perfect, consensus has evolved within the IBDR field that frustrated needs and interests are a major cause of conflict.¹⁵² For example, Herbert Kelman has concluded that international conflicts are “typically driven by nonfulfillment or threats to the fulfillment of basic needs.”¹⁵³ John Burton posits that “deep-rooted” conflicts—conflicts that are manifested by such extreme acts as terrorism, gang warfare, and dissident behavior—result from the “frustration of certain human needs.”¹⁵⁴ And from their extensive experience mediating individual and commercial disputes, Gary Friedman and Jack Himmelstein have found that understanding the interests that drive conflicts is a crucial component of managing and resolving them.¹⁵⁵ This consensus spans a wide range of dispute contexts and is broad enough to include scholars who might otherwise reject the IBDR label.¹⁵⁶

¹⁵⁰ See *supra* notes 124–137.

¹⁵¹ JOHN GRAY, *TWO FACES OF LIBERALISM* 9 (2000).

¹⁵² See *supra* note 1 for my definition of IBDR and *infra* notes 180–186 for a more nuanced statement of this claim. For a somewhat different typology of dispute resolution theories, see generally Alberstein, *supra* note 62 (dividing mediation theory into three broad categories: pragmatist or interest-based, transformative, and narrative).

There are, of course, other causes of conflict, but they are beyond the scope of this article.

¹⁵³ Kelman, *supra* note 147, at 64.

¹⁵⁴ BURTON, *supra* note 122, at 21.

¹⁵⁵ See FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 116–17.

¹⁵⁶ Here, I have in mind scholars such as John Burton, Kevin Avruch, Robert Baruch Bush, and Joseph Folger. Each recognizes the importance of understanding the unacknowledged needs and interests that often lie obscured beneath conflicting claims and positions, even if he does not conceive of dispute resolution’s primary mission as the negotiation of those needs and interests.

What are “needs” and “interests”? A simple working definition is that they are “desires, concerns, or fears—the things one cares about or wants.”¹⁵⁷ Interests explain why we are motivated to act in certain ways or why certain things are important to us.¹⁵⁸ IBDR scholars believe that interests, more than reason or moral imperative, drive human action and set human agendas. Dean Pruitt and Hung See Kim, for example, argue that interests are “central” to the way we think and act, and “form[] the core” of many of our “attitudes, goals, and intentions.”¹⁵⁹ Similarly, Burton believes that because “there are limits to the extent to which the human person . . . can be socialized or manipulated,” satisfying basic human needs is a precondition of effective conflict management.¹⁶⁰

Although there is much disagreement on the details, a common theme in the IBDR literature is that interests, broadly construed,¹⁶¹ form a continuum. At one end of the continuum are generic interests such as the need for security, identity, happiness, and physical well-being.¹⁶² They are considered by some to be “universal” or “innate” drives that are largely outside our ability to control or suppress (except perhaps at great psychic or behavioral cost).¹⁶³ At the other end of the continuum are more concrete interests—what people claim or think they must have. These are typically referred to in the negotiation literature as “wants” or “positions,” and their importance and existence is considered to vary from group to group.¹⁶⁴

¹⁵⁷ WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 5 (1993).

¹⁵⁸ Fisher and Ury explain this as follows: “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.” FISHER ET AL., *supra* note 6, at 41.

¹⁵⁹ PRUITT & KIM, *supra* note 104, at 15.

¹⁶⁰ See BURTON, *supra* note 122, at 23.

¹⁶¹ My rather capacious conception of “interests” includes things that other theorists would think of as “needs” or “values.” See *infra* notes 180–186 and accompanying text.

¹⁶² See PRUITT & KIM, *supra* note 104, at 16 (describing as needs such as “physical well-being, security, identity, freedom, justice, respect, and clarity about the nature of one’s world” in terms of “interests . . . that are virtually universal”); see also BURTON, *supra* note 122, at 33 (noting universal needs for identity, recognition, security and development). See generally Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370 (1943) (classifying “basic needs” into five broad categories: physiological well-being, safety, love, esteem, and self-actualization).

¹⁶³ See, e.g., BURTON, *supra* note 122, at 21, 32; PRUITT & KIM, *supra* note 104, at 16.

¹⁶⁴ See SUSSKIND & FIELD, *supra* note 143, at 154; Lawrence Susskind, *An Alternative to Robert’s Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want To Operate By Consensus*, in THE CONSENSUS BUILDING

At the level of positions, the possibilities for discussion and engagement are limited. Positions express a desire for a specific result or outcome that can be satisfied only in a limited number of ways.¹⁶⁵ When no one way is acceptable to all, arguing about positions can quickly devolve into a tug-of-war over whose positions are right or wrong, whose are superior or inferior. This can set in motion many of the destructive conflict dynamics I sketched in Part III.A, above.

By contrast, focusing on interests opens up more possibilities for constructive engagement. Because interests are the more general motivators behind positions, the same interest can typically be fulfilled through multiple positions that do not necessarily result in conflict.¹⁶⁶ Take what is now a textbook example: The longstanding dispute in the late 1960s and 1970s between Egypt and Israel over the Sinai Peninsula.¹⁶⁷ Until the negotiations at Camp David, each side had framed the conflict solely in positional terms. The proposed solutions all took the form of dividing up the Sinai geographically—a classic form of compromise that failed to consider underlying interests and, perhaps for that reason, was largely unpalatable to both sides.¹⁶⁸ By looking at the reasons why control of the Sinai was important to both nations, however, it became clear that Egypt was motivated by concerns about its sovereignty (reclaiming territory that had historically belonged to Egypt) while Israel's interest was in security (maintaining a military buffer zone between the two contiguous nations).¹⁶⁹ The conflict was resolved by giving Egypt control of the Sinai in exchange for demilitarizing the border areas. That is, each side effectively relinquished its position (complete territorial control of the Sinai) in order to vindicate their real interests.¹⁷⁰

This example suggests at least two types of reasons why IBDR focuses on interests. The first is instrumental: Probing for interests is valued either because it helps maximize utility,¹⁷¹ increase the “cooperative surplus,”¹⁷² or

HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT, *supra* note 146, at 3, 6.

¹⁶⁵ FISHER ET AL., *supra* note 6, at 42

¹⁶⁶ *Id.*

¹⁶⁷ For a discussion of this example, see *id.* at 41–42.

¹⁶⁸ See *id.* at 41.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 42.

¹⁷¹ See BUSH & FOLGER, *supra* note 15, at 48–49 (describing the “problem solving” model of mediation as based on a conception of disputants as rational maximizers concerned only for their private self-interests); Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 342 (2003)

simply because it stands the greatest chance of breaking the impasse that so often characterizes conflicts.¹⁷³ The second is intrinsic: Focusing on interests is a way to build bridges between contending parties by unearthing the forgotten commonalities that unite them.¹⁷⁴ It is a deeper level of engagement about conflict that seeks to uncover what is truly at stake for the disputants and that results in more meaningful, lasting outcomes.¹⁷⁵ Although both reasons for privileging interests are important to IBDR's orientation to conflict, it is primarily the latter that concerns me in this article.

A searching, interest-based discussion is not the norm, especially during conflict. Our instincts are instead to debate at surface level of positions.¹⁷⁶ This is partly because discerning the deeper interests that underlie a dispute requires a certain degree of skill in information gathering, understanding, and empathy.¹⁷⁷ In addition, there is rarely only one interest animating a position.

(noting that IBDR has been criticized for its "rationalistic or economic" assumptions). See generally DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29–45, 88–116 (1986) (using game theoretic principles to describe opportunities for joint gain in negotiation and dispute resolution).

¹⁷² See, e.g., RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 129–30, 134–37 (2002) (describing interest-based bargaining as a technique to expand cooperative surplus); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 35–37 (2000) (presenting the elicitation of interests as a precursor to making "value-creating trades").

¹⁷³ FRIEDMAN & HIMMELSTEIN, *supra* note 123, at xxxiii, 116–18; Dean G. Pruitt, *Achieving Integrative Agreements*, in *THE NEGOTIATION SOURCEBOOK* 187, 188–92 (Ira G. Asherman & Sandra Vance Asherman eds., 2d ed., 2001).

¹⁷⁴ See CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 348 (2005) (observing that "[W]hen parties discover they share an interest or value or feeling it can become a common motivator and bridge" (quoting LELA P. LOVE & JOSEPH B. STULBERG, *TARGETS AND TECHNIQUES TO GENERATE MOVEMENT*)); SUSSKIND & FIELD, *supra* note 143, at 165–66 (advocating the acknowledgment of shared values as a stepping stone to a less adversarial relationship and a more productive dialogue).

¹⁷⁵ See FRIEDMAN & HIMMELSTEIN, *supra* note 123, at xxxiii (explaining the authors' approach to mediation as seeking to "deepen the parties' understanding of what lies under the surface of their conflict . . ."); Carrie Menkel-Meadow, *The Ethics of Compromise*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR*, *supra* note 130, at 155, 156 (arguing that interest-based negotiation is "morally superior" to other forms of resolving conflicts because it treats others as ends and not means, and because it eschews adversarial argument).

¹⁷⁶ See Deutsch, *supra* note 124, at 11; Northrup, *supra* note 60, at 62.

¹⁷⁷ Cf. MENKEL-MEADOW ET AL., *supra* note 174, at 155 ("Far from being an intuitively simple task, listening is a skill. . . [that] requires awareness and practice of

Instead, positions are likely to be underwritten by a host of interests that are shifting, contradictory, and even opaque to the advocate of the position.¹⁷⁸ The value-added of IBDR is to emphasize the importance of understanding the interests that drive conflicts and to explain how to deepen the discussion from the level of positions to the level of interests.¹⁷⁹

To be sure, there is considerable dissensus even within the IBDR community as to whether interest-based negotiation is in fact capable of resolving profoundly divisive issues such as abortion and capital punishment, at least in ways that we would find adequate or desirable.¹⁸⁰ Some posit that such conflicts implicate not just interests but fundamental human “needs” that are not amenable to negotiation and that can only be addressed through institutional change.¹⁸¹ Others argue that, in addition to the needs that underlie interests, there are “values”—described as “strongly held personal beliefs, moral and ethical principles, . . . [or] idealized views of the world”—that are similarly non-negotiable.¹⁸² Still others suggest that in especially

specialized techniques” (quoting DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (1991)); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* 17, 144–46 (2002) (arguing that listening is a negotiation “skill” and that it “requires effort for competitive types”).

¹⁷⁸ See Blum & Mnookin, *supra* note 142, at 108.

¹⁷⁹ See, e.g., Kelman, *supra* note 147, at 67 (arguing that the “ultimate criterion” for success in managing conflicts is how well underlying needs and interests are met); Pruitt & Olczak, *supra* note at 141, at 67 (observing that interest-based negotiation is “the most popular approach to conflict resolution . . . Conflict is often resolved, or at least diminished, through negotiation.”). See generally ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* (1994) (advocating a problem solving paradigm for addressing international conflicts).

¹⁸⁰ See, e.g., Northrup, *supra* note 60, at 56–57 (criticizing what the author takes as a prevailing assumption in the conflict resolution field that social conflicts can be negotiated in a rational manner); Stuart J. Thorson, *Introduction: Conceptual Issues*, in *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION*, *supra* note 60, at 1, 9 (Louis Kriesberg et al. eds., 1989) (“[D]eeply intractable conflicts . . . are unlikely to be resolved simply by outside parties suggesting hitherto unseen zones of agreement.”). Certainly, techniques other than interest-based problem solving will also be important to the effective management of conflict. They are, however, beyond the scope of this article.

¹⁸¹ See BURTON, *supra* note 122, at 15, 36–41 (explaining that, although there is a “close relationship” between interest-based disputes and needs-based conflicts, the latter cannot be resolved through negotiation). Some scholars have sought to construct elaborate typologies that differentiate non-negotiable needs from negotiable positions and interests. See generally Maslow, *supra* note 162, at 70.

¹⁸² SUSSKIND & FIELD, *supra* note 143, at 154; see also Kevin Avruch, *The Poverty of Buyer and Seller*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR*, *supra* note 130, at 81, 83, 85 (“[V]alues-based conflicts are rarely if ever amenable to interest-based negotiations.”); John Agnew, *Beyond Reason:*

intractable conflicts, negotiating over interests is not just futile but may even make matters worse.¹⁸³

In my view, the important point is not whether something is labeled a “value,” an “interest,” or a “need,” but rather that one recognizes a continuum of motivators underlying any given dispute. These motivators can be expressed in increasingly more negotiable and interest-based ways in one direction, and in increasingly more non-negotiable and positional ways in the other.¹⁸⁴ For the sake of simplicity and only for purposes of this article, I group together needs, values, and interests under the generic banner of “interests.” I align IBDR with Pruitt and Kim’s assertion that underneath any given interest is a still more general interest—in other words, that there is nothing but more “interests underlying interests.”¹⁸⁵ I also define the IBDR view to be consistent with Morton Deutsch’s observation that most so-called “non-negotiable” issues are in fact negotiable at a deeper level given some effort at empathy and understanding.¹⁸⁶

Spatial and Temporal Sources of Ethnic Conflicts, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION, *supra* note 60, at 41, 51 (observing that “interests can be negotiated, principles cannot”); Maslow, *supra* note 163, at 70.

¹⁸³ See Susan Hunter, *The Roots of Environmental Conflict in the Tahoe Basin*, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION, *supra* note 60, at 25, (“[A]ttempts to redefine a conflict or to search for mutual interests sometimes exacerbate the situation, intensifying the long-term conflict.”).

¹⁸⁴ Thus, even if our core values are immutable, as long as they can be concretized in a variety of different positions, conflicts at the positional level can be avoided.

¹⁸⁵ See PRUITT & KIM, *supra* note 104, at 199. To reiterate: Not all IBDR scholars would endorse this view. I elide the important disagreements within the IBDR community in order to illustrate our collective divergence from deliberative democracy theory.

¹⁸⁶ See Morton Deutsch, *Internal and External Conflict*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR, *supra* note 130, at 231, 237. This position finds support from other scholars who view values as potentially negotiable. See, e.g., Kevin Gibson, *Ethics and Morality in Negotiation*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR, *supra* note 130, at 175, 180 (suggesting that some values can be traded); Robert Ricigliano, *A Three-Dimensional Analysis of Negotiation*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR, *supra* note 130, at 55, 58–59 (suggesting that while interests can be negotiated at a transactional level, needs and values can only be negotiated on a longer time horizon).

This is not to deny that there are practical limits to what can and cannot be negotiated. Instead, the point is that these limits cannot be discerned in advance by identifying the subject of negotiation as either an ontological need or a culturally bounded interest. From this vantage point, the same interest-based techniques that we have already been using in a wide variety of disputes are not necessarily inappropriate for deep conflicts like abortion.

On the IBDR view as I have presented it in this Part, conflict cannot and should not be addressed through reason-giving or positional argumentation alone. Without understanding the complexity and profundity of the interests that animate a dispute, even sincere and good faith efforts at dialogue will be thwarted by the destructive dynamics of conflict.¹⁸⁷

IV. CONFLICTS OF ORIENTATION: DELIBERATIVE DEMOCRACY THEORY FROM AN IBDR PERSPECTIVE

Having set out deliberative democracy and IBDR's respective orientations to conflict in Parts II and III, I now turn to a deeper exploration of their differences. In this Part, I argue that deliberation is an evaluative procedure that seeks to distinguish between good and bad interests, selfish and public spirited ones. Deliberation views pre-political interests with skepticism and distrust unless they have first been "laundered" through the deliberative process.¹⁸⁸ In sharp contrast, IBDR resists any substantive line-drawing over interests, preferring instead to distinguish between different levels of interests: on the one hand, concrete claims and positions that we can more readily understand and control and, on the other, more profound and irresistible needs that drive those positions. The goal is to find authentic and freely chosen ways to accommodate the latter but not necessarily the former.

If I am correct that the two fields harbor fundamentally different understandings of the significance of pre-given interests and their role in conflict resolution, this should raise a number of concerns for IBDR theorists and practitioners who consider their work to be consistent with deliberative democracy theory. It suggests, for example, that interest-based problem solving would be of dubious value in a deliberative world.¹⁸⁹ It suggests that deliberation may be more about judging what is right for the common good—what we *should* want—rather than figuring out what we *can* all want. Finally, if deliberation is essentially an evaluative process in which some interests are rejected as unreasonable, it suggests the coercive and exclusionary character of reason-giving discourse. In this Part, I take up these suggestions.

¹⁸⁷ See *supra* notes 123–143 and accompanying text.

¹⁸⁸ SUNSTEIN, *supra* note 80, at 243–44.

¹⁸⁹ See *infra* Part IV.B.

A. *The Taming of Interest*

“[U]nless I am propelled forward by the conatus of desire, project and interest, it is unclear why I should go on at all.”

—Bernard Williams¹⁹⁰

If IBDR seeks to understand and satisfy the deeper interests that drive conflict, deliberative democracy has grander ambitions: to transform “objectionable or distorted preferences”¹⁹¹ into “desirable, democracy-promoting” ones.¹⁹²

To better grasp this point, it is helpful to revisit the way that deliberative democracy defines itself against so-called “bargaining”-based models of democracy. In the deliberative view, bargaining puts interests before politics—politics is simply the means by which instrumental actors struggle to fulfill their preordained ends.¹⁹³ By contrast, deliberative theory puts politics before interests. Politics is the medium in which we subject our pre-political interests to discursive scrutiny.¹⁹⁴ It is only after participating in the give and take of political discussion that we come to realize the ways in which those interests (often) conflict with the common good. As Gutmann and Thompson put it: “When individuals and groups bargain and negotiate, they may learn how better to get what they want. But unless they also deliberate with one another, they are not likely to learn that they *should not* try to get what they want.”¹⁹⁵

¹⁹⁰ Bernard Williams, *Persons, Character, and Morality*, reprinted in BERNARD WILLIAMS, *MORAL LUCK* 1, 12 (1981).

¹⁹¹ Sunstein, *supra* note 37, at 1543–44 (suggesting that a “significant purpose of politics” may be to filter out “objectionable or distorted preferences”).

¹⁹² Cohen & Rogers, *supra* note 120, at 242 (explaining that deliberation “changes preferences in desirable, democracy-promoting, ways”).

¹⁹³ Cf. Sunstein, *supra* note 37, at 1542 (contrasting deliberative politics with pluralist and interest-group politics generally); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 313 (1992) (contrasting deliberation with other models that conceive of democracy as a “struggle” among “self-interested private groups”).

¹⁹⁴ See Sunstein, *supra* note 37, at 1544 (“[P]olitics should not simply implement citizen desires, but should also allow for a measure of critical distance from and scrutiny of those desires.”).

¹⁹⁵ GUTMANN & THOMPSON, *supra* note 29, at 43 (emphasis added); see also GUTMANN & THOMPSON, *supra* note 59, at 16 (arguing that, unlike bargaining, deliberation shows citizens what they “should desire if they were more public spirited or if they were more inclined to respect the principle of reciprocity.”); SUNSTEIN, *supra* note 79, at 178 (“[P]olitical autonomy can be found in collective self-determination, as citizens decide, not what they ‘want,’ but instead who they are—what their values are and what those values require.”); Cohen, *supra* note 37, at 67 (arguing that unlike bargaining

A deliberative democracy does not, therefore, accept citizens' interests as it finds them. It aims in part at "the formation of preferences and convictions, not just at their articulation and aggregation."¹⁹⁶ Thus, Sunstein insists that "[p]olitical actors are not supposed to come to the [deliberative] process with preselected interests."¹⁹⁷ Or, as Seyla Benhabib argues, "the formation of coherent preferences cannot precede deliberation; it can only succeed it."¹⁹⁸ Unlike the bargainer, who deliberative democrats portray as slavishly bound to pre-selected needs and interests, the deliberative citizen is expected to be flexible, always prepared to modify or jettison his or her commitments for more "public-spirited" ones.¹⁹⁹

Cohen imagines this as follows: "[W]hile I start preferring most what is best for me or my group, the practice of defending proposals with reasons may *change my preferences*" toward what is good for all.²⁰⁰ To illustrate, Cohen offers the example of a participant who enters deliberation wishing to be wealthy at any cost.²⁰¹ In Cohen's view, the participant should not "appeal

and other "market-type interactions," deliberation "helps form the aims" of those participating in deliberation).

¹⁹⁶ Cohen, *supra* note 37 at 83.

¹⁹⁷ Sunstein, *supra* note 37, at 1548; *see also* SUNSTEIN, *supra* note 80, at 245 ("Politics is emphatically not a process in which desires and interests remain frozen, before or during politics.").

¹⁹⁸ Benhabib, *supra* note 36, at 32.

¹⁹⁹ *See* GUTMANN & THOMPSON, *supra* note 29, at 43; *see also* JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 170 (2000) ("Deliberation requires participants to be amenable to reflecting upon and changing their preferences and views."); Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1526 (1988) (noting that dialogic republicanism does not work where citizens are "completely impervious to the persuasion" of others).

Gutmann and Thompson reaffirm this view in their most recent book on deliberative democracy. *See* GUTMANN & THOMPSON, *supra* note 59. On this view, the problem with non-deliberative forms of democracy is that even when they manage to cultivate desirable preferences, they "still seek to respect what citizens or voters actually desire, or would desire if they were better informed." *Id.* at 16. A deliberative democracy, by contrast, instills in citizens a sense of "what they should desire" based on a respect for the common good and for what the authors call the "principle of reciprocity." *Id.*

²⁰⁰ Cohen, *Deliberative Democracy*, *supra* note 22, at 228 (emphasis added); *see also* SUNSTEIN, *supra* note 80, at 243–44 (suggesting that deliberation may help "launder" preferences" by requiring citizens to justify outcomes in public-regarding terms); Cohen, *supra* note 37, at 67 (arguing that unlike bargaining and other "market-type interactions," deliberation "helps to form the aims of the participants"); Elster, *supra* note 42, at 6 (stating that the ostensible goal of rational deliberation is the "transformation of preferences").

²⁰¹ *See* Cohen, *supra* note 37, at 77.

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

to this desire” when proposing or defending policies.²⁰² Instead, he or she must find a ground “independent” of this desire that is consistent with the common good, such as the more balanced and inclusive desire to be wealthy, but only to the degree that other citizens can accept.²⁰³

Here, then, is a major premise of deliberative theory: Conflicts in the political arena are to be regulated by changing or scrutinizing pre-political interests, not by finding mutually acceptable ways to give them each a voice. The purpose of deliberation is to subject what are conceived as essentially arbitrary desires to the discipline of reasoned considerations, in light of which some interests will be judged right and others wrong.²⁰⁴ Autonomy, on this view, is the ability and willingness to adopt certain kinds of preferences and, correspondingly, to detach from certain others in rational, democracy-enhancing ways.²⁰⁵

By contrast, the IBDR approach accepts interests as they are and seeks to understand how those interests—not the concrete positions through which they were first expressed—can all be satisfied in ways that stabilize or resolve conflict. The point is not that the ideal IBDR citizen is unable to reflect on or revise his or her interests through dialogic processes. The willingness to change and be transformed in the course of problem solving is undoubtedly an IBDR virtue; the question is simply at what level. On the IBDR view, there is no necessary contradiction between remaining faithful to one’s deeper interests while at the same time adopting a creative and flexible approach to the concrete outcomes that those interests truly require. In fact, learning how to articulate and assert one’s pre-given interests may help loosen one’s grip on particular demands or positions.²⁰⁶

Thus, consensus building expert Michael Poirier Elliott explains: “The consensus building practitioner does not seek to change the values and interests held by the participants, but rather to clarify them and to assist participants in reexamining how their values and interests might be best

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See Cohen, *Deliberative Democracy*, *supra* note 22, at 223; see also GUTMANN & THOMPSON, *supra* note 29, at 64 (arguing that, in order for decision to be democratically legitimate, the decision cannot be a function of “the strength and intensity of one’s interests” but rather of a “consideration of the merits of each side’s claims”).

²⁰⁵ Cohen, *supra* note 37, at 78 (explaining that the shaping and forming of preferences through deliberation is consistent with autonomy because it expresses “the power of reason as applied through public discussion” (quoting *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring))).

²⁰⁶ See FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 107 (“Once you believe you are truly understood, you can begin to free yourself from having to fight for your position.”).

met.”²⁰⁷ Friedman and Himmelstein make the same point when arguing against the conventional approach to conflict, which in their view assumes that resolution requires convincing one of the parties to change. They use mediation not to change parties or to “knock some sense into them,” but rather to help them clarify, articulate, and stand up for the unmet interests that lie at the heart of their dispute.²⁰⁸

Deliberative theorists are undoubtedly correct that, on some level, interests are essentially arbitrary—products of tradition, culture, or socialization that come with no warrant of rightness. But it is precisely the contingency of our interests that, on the IBDR view, makes them significant. Interests do not necessarily go away just because we decide they are morally reprehensible or because we wish we could have better ones. In many respects they drive us more than we drive them. Conflict is often the result of a fear of having to abandon or alter interests that are fundamental to our identity—interests that we cannot live without.²⁰⁹ This fear was evident in the confession of one participant in a consensus building workshop convened to explore “common ground” on abortion: “I don’t want to give up my pro-life belief that life begins at conception. I don’t want to be tainted in common ground mush. I feel comforted hearing that I’m not being asked to give up or compromise my beliefs.”²¹⁰

IBDR seeks to honor the depth of this participant’s commitments rather than evaluate whether they are good or bad.²¹¹ The simple fact that the participant has such commitments makes their existence legitimate and worthy of accommodation in mutually acceptable ways.²¹² In sharp contrast to deliberative theory, IBDR openly acknowledges that disputants “enter the

²⁰⁷ Poirier Elliott, *supra* note 146, at 213. An internal disagreement on this issue appears to be emerging. Consensus building scholar John Forester, for example, warns that IBDR’s traditional focus on interests may be inappropriate in the context of broader public policy disputes, where considerations of morality and democratic legitimacy are more important. See FORESTER, *supra* note 2, at 177–81 (offering Sunstein’s work in deliberative democracy as a possible alternative model).

²⁰⁸ See FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 128 (“The point is not to challenge or change the party’s position, but to simply explore the parties’ motivations that underlie their positions.”).

²⁰⁹ See Kelman, *supra* note 147, at 64–65.

²¹⁰ LeBaron & Carstarphen, *supra* note 148, at 1038.

²¹¹ See, e.g., FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 107 (suggesting that disputants become less rigid when they have reason to believe that their opponents understand “what underlies the strength of [their] convictions”).

²¹² See Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS, *supra* note 38, at 107, 126 (“[S]imply stating that something is in one’s interest is a justification.”).

process to serve their [pre-political] interests.”²¹³ IBDR helps them achieve that goal through something like Aikido: instead of fighting against interests, the goal becomes to find a way to use their strength and their undeniable influence over us for mutual gain.²¹⁴ This involves identifying, through techniques such as active listening and empathy, ways of satisfying those interests without necessarily satisfying the conflicting positions through which the interests were originally expressed.²¹⁵

Deliberative democrats are at best uncertain about the value of articulating and clarifying pre-political interests. For example, Samuel Freeman has argued that empathetic understanding is of questionable importance to some deliberativists and “could even be distracting” depending on the type of deliberation one seeks to promote.²¹⁶ Similarly, Cohen claims that open-ended discussion aimed at mutual understanding of similarities and differences “may be a helpful precursor” to deliberation, but he suggests that such discussions do not themselves count as deliberation.²¹⁷ Although understanding interests may contribute to the discovery of new facts and arguments, Cohen believes that interests themselves are unpersuasive for purposes of justifying a deliberative outcome. The only “relevant”

²¹³ Innes, *supra* note 108, at 14; *see also* FISHER ET AL., *supra* note 6, at 50 (“The purpose of negotiating is to serve your interests.”). By contrast, Sunstein argues, “Political actors are not supposed to come to the [deliberative] process with preselected interests.” *See* Sunstein, *supra* note 37, at 1548.

²¹⁴ Many have noted similarities between the principles of Aikido and ADR practices such as mediation. *See, e.g.*, Jonathan L. Miller, *The Practices of Aikido and Mediation*, COLORADO COUNCIL OF MEDIATORS NEWSLETTER, Summer 2007, http://www.jmsamp.com/ccmo/20070629_newsletter.html.

²¹⁵ A consistent observation among IBDR practitioners is that mutual understanding and the honoring of interests is a crucial factor in helping parties in conflict learn how to work together. *See, e.g.*, FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 128; STONE ET AL., *supra* note 123, at 163–84; Deutsch, *supra* note 186, at 237.

²¹⁶ *See* Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. & PUB. AFFAIRS 371, 386 (2000) (suggesting that understanding human interests is largely irrelevant to Habermas’s model of discourse).

²¹⁷ Thus, Cohen concludes that we do not yet have “a compelling case for the interesting idea . . . that discourse [focused on the promotion of mutual understanding] helps to set the stage for a more fruitful deliberation.” Cohen, *Deliberative Democracy*, *supra* note 22, at 224. This conclusion is consistent with Iris Marion Young’s charge that deliberation is not a dialogic process that emphasizes mutual understanding. *See* Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 120, 123 (Seyla Benhabib ed., 1996) (“Deliberation is competition. Parties to dispute aim to win the argument, not to achieve mutual understanding.”).

preferences, on this view, “are those that arise from or are confirmed through deliberation.”²¹⁸

Part of what animates the deliberative theorist’s skepticism toward interests is the assumption that self-interest is in constant tension with the common interest.²¹⁹ Thus, Sunstein presents one of the virtues of deliberation as helping citizens “achieve a measure of critical *distance* from prevailing desires and practices.”²²⁰ This is very different from the paradigm of enlightened self-interest familiar to IBDR theory, in which self-interest and common interest are not necessarily opposed. Indeed, the goal of interest-based problem solving is precisely to find creative ways that advance both.

In this vein, consider Jon Elster’s hypothetical of a well-off group that is motivated by self-interest to propose tax breaks only for itself.²²¹ On Elster’s view, the probability that such a policy would survive a process of deliberation increases as the well-off group reforms its interest in more “impartial” ways—that is, in ways that “*deviate[]* enough from . . . self-interest to be accepted by others.”²²² An example of such a formulation might be a tax that benefits not just well-off groups but also some badly-off groups.

The example betrays a conception of self-interest and common interest as forming opposite poles of a one-dimensional spectrum: The more a proposal moves toward the pole of self-interest, the more it moves away from the pole

²¹⁸ Cohen, *supra* note 37, at 83.

²¹⁹ See Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236, 246 (Kenneth J. Arrow et al. eds., 1995) (concluding it is “quite likely” that an impartial proposal that is perfectly aligned with self-interest or that comes close to it will not optimally serve the common good); Cohen, *Deliberative Democracy*, *supra* note 22, at 228 (“[T]he practice of defending proposals with reasons may change my preferences, dampening the tension between my beliefs about what is right or politically legitimate and what I prefer.”); Cohen, *supra* note 37, at 71 (“Even an ideal [bargaining democracy] . . . cannot reasonably be expected to advance the common good.”).

This profound distrust of self-interest is undoubtedly a function of deliberative democracy’s aversion to aggregative and bargaining-based theories of democracy, whose starting point is Schumpeter’s pessimism about the possibility of genuine and constructive discursive engagement in conditions of modernity. See *supra* note 43 and accompanying text.

²²⁰ Sunstein, *supra* note 37, at 1548–49 (emphasis added).

²²¹ See Elster, *supra* note 219, at 246.

²²² *Id.* at 246 (emphasis added). Elster does not conceive of this as a purely strategic tactic. Instead, he believes that by framing proposals in other regarding ways the well-off group members will likely learn to detach from their originally self-interested perspective and adopt a more public spirited one. This is what Elster has referred to as the “civilizing force of hypocrisy.” See *id.* at 250; see also Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY, *supra* note 33, at 97, 111.

of common interest. This assumption sometimes leads deliberative theorists to conceive of the optimal solutions as compromises—diluted versions of either pole. Thus, a desire to be wealthy at any cost becomes a proposal to be wealthy but only to the extent acceptable to all.²²³ Unlike interest-based negotiation, which encourages the pursuit of “win-win” outcomes, in a deliberative democracy, it is “not reasonable to demand to win.”²²⁴

From an IBDR perspective, the interests of the individual and those of the group are not necessarily part of a zero sum game. Deliberative theory assumes on some level that we must choose between our interests and the general good. But by distinguishing between positions, interests, and “interests underlying interests,”²²⁵ IBDR shows us a way both to remain true to our deeper concerns and adapt in flexible ways to accommodate the underlying concerns of others. Interests are not monolithic; they span a continuum from general to concrete, malleable to fixed.²²⁶ By searching for the “interests underlying interests,” we at once deepen our pre-given commitments *and* revise our understanding of the particular (or positional) outcomes they require. In other words, IBDR asks us to be supple in our positions but encourages us to be stubborn about our deeper needs. Autonomy consists not in choosing or controlling one’s self-interest, but in fully pressing the motivators that lie behind them while fully empathizing with those of others.²²⁷

A simple and well-worn example will illustrate: Two children each desire an orange.²²⁸ The deliberativist asks each child to recognize that the desire to possess the entire orange for herself is unreasonable. Instead, each

²²³ See Cohen, *supra* note 37, at 77.

²²⁴ Cohen & Sabel, *supra* note 20, at 322 n.20. The reason offered for this assertion is that “any decision will be opposed by some people.” *Id.* Similarly, Sunstein counsels that in a deliberation, “‘much [is] [to be] gained by a yielding and accommodating spirit.’” SUNSTEIN, *supra* note 79, at 164 (quoting James Madison’s remarks during the Federal Convention of 1787).

²²⁵ See PRUITT & KIM, *supra* note 104, at 199.

²²⁶ See *supra* notes 157–170 and accompanying text.

²²⁷ Robert Mnookin and his colleagues have captured this in what they refer to as the “tension between empathy and assertiveness.” See MNOOKIN ET AL., *supra* note 172, at 44–68. Managing the tension requires finding ways to stand up for one’s needs without bulldozing the other side and, by the same token, giving voice to the other’s concerns without losing sight of one’s own. See *id.*; see also PRUITT & KIM, *supra* note 104, at 38–42 (stating that problem solving is most effective when, rather than seeking compromise, both sides show a high degree of concern for their own and the other’s interests). This is one of the core skills of interest-based problem solving, but there would appear to be little occasion to develop it in a deliberative democracy.

²²⁸ For a well-known rendition of this example, see FISHER ET AL., *supra* note 6, at 57.

child should stand apart from that desire to find fair terms of cooperation that are acceptable to the other. Examples might include a rule of “one cuts, the other chooses,” or a rule that the orange should go to the child who is worse off, or perhaps to the one who would benefit the most from it.²²⁹ The children are then urged to present reasons in favor of one or the other rule of allocation. In the course of doing so, they are informed that they “are not supposed to come to the process with preselected interests,”²³⁰ that the only “relevant” preferences to consider are those endogenous to their deliberation,²³¹ and that in order to treat each other with mutual respect, they “should not try to get what they want.”²³²

The dispute resolver sees a different set of facts. Each child firmly believes she has ironclad reasons that justify her exclusive possession of the orange—for example, because she behaved better, because it was her turn, or because she was wronged in some way by the other. The conflict over the orange is just the tip of the iceberg; what is important are the frustrated needs and interests that remain occluded beneath it. IBDR goes to the root of the conflict by asking each child to articulate what underlying interests the orange will satisfy and to discover whether those interests can be furthered in other, mutually acceptable ways. Perhaps both children are hungry, but one child has temporarily lost her sense of taste due to illness and so is equally happy eating something else. Perhaps one child has no real interest in the orange but is concerned by the fact that the other child always seems to get what she wants. Or perhaps, according to the well known story, one child merely wants the rind for a cake she is baking.²³³

In a deliberative democracy, the children in the first case might well decide that the child with the illness deserves the orange because of her greater need. In the abstract, this seems fair. But combine this with the second case and we have a potential situation in which the healthy child is also the one who believes the sick child unfairly gets everything she wants (and has just succeeded in doing so again). As more layers of human experience are superimposed on this dispute, it becomes harder to endorse the deliberative outcome as superior to one based on the negotiation of interests—one in which the healthy child who feels one down would finally

²²⁹ Cf. Cohen & Rogers, *supra* note 120, at 242 (explaining that relevant (but potentially competing) reasons offered to resolve issues of health care might include “benefiting those who are worst off” or “aiding those who would benefit most from medical resources”).

²³⁰ Sunstein, *supra* note 37, at 1548.

²³¹ See Cohen, *supra* note 37, at 83.

²³² GUTMANN & THOMPSON, *supra* note 29, at 43.

²³³ See FISHER ET AL., *supra* note 6, at 57.

get her due and the sick child would come to realize that her real interest is likely not in the orange itself, which she cannot taste, but in nourishment.

Here one might rightly ask whether deliberation could not also yield such an integrative, win-win result. Deliberation is essentially a reasoned dialogue about differences that seeks to improve the quality of decisions. Does that not describe precisely how the two children resolved their conflict using interest-based problem solving? To these questions I now turn.

B. *The Uncertain Status of Interest-Based Problem Solving*

“What’s needed is a broad majority of Americans . . . who . . . see their own self-interest as inextricably linked to the interests of others.”

—Barack Obama²³⁴

If the children in the prior example were citizens of a perfect deliberative polity, would they ever reach an interest-based outcome given deliberative theory’s suspicion of pre-political interests? Some suggest that they would. Menkel-Meadow, for example, notes that both IBDR and deliberative democracy “believe that deciding issues on the basis of interests or needs rather than positions . . . will produce better and more inclusive outcomes.”²³⁵ While not entirely disagreeing with this observation, I submit that the issue is in need of further qualification.

To better explain this point, I will need to distinguish between the types of justifications that are considered appropriate in deliberation and the types of outcomes that deliberative processes aim to further. There are four possible combinations of justifications and outcomes, as illustrated in the table below.

²³⁴ BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 40 (2006).

²³⁵ Menkel-Meadow, *supra* note 8, at 18. Menkel-Meadow is also aware of the important differences between IBDR and deliberative democracy. *See* Menkel-Meadow, *supra* note 5, at 359 (arguing that deliberative democracy theory “needs to learn from dispute resolution theory” about interest-based bargaining and the way it can complement principled argumentation).

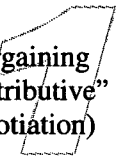
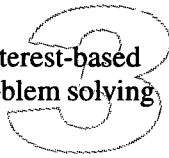
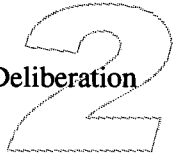
		Type of Outcome	
		Self-interest	Common good
Type of Justification	Self-interest	Bargaining ("distributive" negotiation) 	Interest-based problem solving 
	Common good		Deliberation 

Table 1: 2 x 2 Tabular representation of reasons based on the type of outcome (the end) to which they are oriented and the type of justification (the means) used to achieve it.

Insofar as deliberative theory portrays bargainers as relying on self-interested reasons to advance outcomes that serve their own interests, bargaining falls within Cell 1.²³⁶ Deliberation falls within Cell 2 because deliberators appeal to publicly-oriented reasons to justify outcomes that benefit the common good.²³⁷ Cell 3 represents integrative problem solving (or “dispute resolution writ large”): promoting results that are in the interests of all with self-regarding reasons. The issue is whether deliberative theorists would also endorse cell 3 as a form of “deliberation.” If not, there would appear to be a fundamental disconnect between deliberative democracy and IBDR.

Deliberation is a way of ensuring that any decision reached will be justifiable to others, even those who disagree. In order to be justifiable in this way, deliberative democrats argue that such decisions must “be supported by *reasons* acceptable to others in the polity of decision-makers.”²³⁸ Cohen

²³⁶ See *supra* notes 46–48 and accompanying text.

²³⁷ See *supra* notes 38–40 and accompanying text.

²³⁸ Cohen & Sabel, *supra* note 20, at 320 (emphasis added); see also GUTMANN & THOMPSON, *supra* note 29, at 52 (noting that the “core of the process of deliberation” is the search for mutually acceptable “reasons”); Cohen & Rogers, *supra* note 120, at 241 (concluding that deliberative democracy puts the exchange of reasons “at the center of collective decisionmaking”); Martí, *supra* note 38, at 29–30 (distinguishing deliberation

defines "acceptable political reason[s]" as reasons that are "compelling to others, acknowledging those others as equals, aware that they have alternative reasonable commitments, and knowing something about the kinds of commitments that they are likely to have—for example, that they may have moral or religious commitments that impose what they take to be overriding obligations."²³⁹ If interest-based problem solving is to count as a form of deliberation, then self-interest must, in some sense, count as an acceptable "reason."

By Cohen's definition, it would appear that even if one group's selfish interests may not be a "compelling" enough reason, the fact that a proposal serves the self-interest of all groups might be, especially if the groups have vastly different moral outlooks such that no other solution seems readily available. For example, Cohen has argued that considerations of "public order" are acceptable reasons to support a blanket prohibition on alcohol consumption.²⁴⁰ But public order can also be thought of as an interest that underlies a position advocating a ban on alcohol. In that case, nothing in principle seems to preclude "interests underlying interests" from qualifying as a reason.²⁴¹ Of the deliberative theorists I consider, Sunstein appears most sympathetic to this point of view.²⁴²

But there are other indications that deliberativists would disagree with this conclusion. In the deliberative imagination, a reason is categorically different from an interest.²⁴³ This is why even the coincidence of all affected

from bargaining on the ground that the former involves a process of argumentation and reason-giving); Sunstein, *supra* note 37, at 1544–45 (arguing that law must be "supported by argument and reasons," not self-interest); Thompson, *supra* note 22, at 498 (noting that "reason giving" lies at the "core of all theories of deliberative democracy").

²³⁹ See Cohen, *Procedure and Substance*, *supra* note 34, at 414.

²⁴⁰ See Cohen, *supra* note 33, at 196.

²⁴¹ Thus, Cohen explains, the fact that a majority of deliberators supports a policy "will itself commonly count as a reason for endorsing it" so long as those deliberators "appeal to considerations that are quite generally recognized as having considerable weight." *Id.* at 197. If a weighty consideration includes the fact that a policy is in everyone's interest and that everyone agrees with this assessment, the mere convergence of self-interests would appear to meet the definition of reason-giving.

²⁴² Sunstein seems to find no objection to interest-based solutions as long as all affected by the result have considered and assented to them. See SUNSTEIN, *supra* note 79, at 183 ("The argument for respecting collective desires seems irresistible if the measure at issue is adopted unanimously.").

²⁴³ See GUTMANN & THOMPSON, *supra* note 29, at 48 (distinguishing reasons, which reflect what we ought to desire, from interests, which reflect what we actually do); SUNSTEIN, *supra* note 79, at 164 (distinguishing the pursuit of "want[s]" from the offering of "reasons"); Cohen, *supra* note 33, at 200–01 (noting that "a reason is not a kind of motivation"); Cohen, *supra* note 37, at 76–77 (suggesting that preferences do not

parties' interests, achieved through interest-based problem solving, does not necessarily amount to a reason for the deliberativist.²⁴⁴ "The point of deliberative democracy," Cohen explains, "is not for people to reflect on their preferences, but to decide, in light of reasons, what to do."²⁴⁵ This process of deciding based on reason-giving is seen as fundamentally different from an interest-based discussion—one in which participants merely disclose and articulate their private needs,²⁴⁶ seek to figure out "how most effectively to satisfy [their] preferences,"²⁴⁷ or realize that certain of their positions (such as preferring cheese over bread, to use Cohen's example) are not consistent with their underlying interests (e.g., in nutrition).²⁴⁸ Instead, deliberation involves coming to understand that one's current interests may "lack an appropriate justification" because they cannot be supported by reasons, understood as "standards of criticism and guidance."²⁴⁹

The categorical distinction that deliberative theorists draw between reasons and interests underpins Gutmann's critique of Fisher and Ury's model of interest-based problem solving.²⁵⁰ For Gutmann, the legitimacy of a result does not consist in the fact that it meets the interests of all, but rather something further.²⁵¹ Take the example of negotiating with Slobodan

in themselves count as "sufficient reasons" to others); Cohen & Rogers, *supra* note 120, at 241 ("[Deliberation] is a matter of offering reasons for alternatives, rather than merely stating a preference for one or another, . . . [in] bargaining."); Thompson, *supra* note 22, at 498 (distinguishing "reason giving" models of democracy from those based solely on interest or preference aggregation).

²⁴⁴ See Cohen & Sabel, *supra* note 20, at 329 (positing that "it will not in general be true that results achieved through . . . bargaining . . . will be defensible by reasons," and contrasting reasons with interests); see also *infra* notes 250–261 and accompanying text.

²⁴⁵ Cohen, *Deliberative Democracy*, *supra* note 22, at 222.

²⁴⁶ See Cohen & Rogers, *supra* note 120, at 241.

²⁴⁷ Cohen, *supra* note 33, at 200.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 201. Similarly, although Gutmann advocates taking everyone's interests into account, she limits this to "legitimate" interests, by which she means something like Cohen's conception of an interest justifiable by reasons. See Gutmann, *supra* note 58, at 16.

²⁵⁰ See Gutmann, *supra* note 58, at 6–8.

²⁵¹ This is a view that Gutmann shares with her frequent co-author, Dennis Thompson. See, e.g., GUTMANN & THOMPSON, *supra* note 29, at 57 (explaining that the mutual acceptability of reasons is not sufficient; the reasons must also be "moral in [a] further sense").

Because Thompson did not join Gutmann in her critique of Fisher and Ury, I refer only to Gutmann in this context. Nonetheless, I believe this critique is consistent with Thompson's views as well. See *id.* Thompson has elsewhere argued that although preferences and desires may be considered during deliberation, the mere concordance of

Milosevic to end the Balkan wars.²⁵² Gutmann argues that a purely interest-based process risks resulting in a “bad, indeed pernicious” outcome—one that may be fundamentally unfair to minority Albanians or that fails to address Slobodan Milosevic’s criminal responsibility.²⁵³ In such cases, the mere fact of a free and uncoerced agreement is not enough; there must be “morally good reasons” to support the agreement in order for it to be democratically legitimate.²⁵⁴ Justice may require us to refuse agreement rather than continue negotiations with a dictator.²⁵⁵ Even in ideal circumstances, therefore, the most that Gutmann can say about interest-based problem solving is that it is procedurally fair.²⁵⁶ But deliberation, we are told, requires more than just procedural fairness: the result must also meet certain basic standards of substantive justice.²⁵⁷

Gutmann’s point is certainly well-taken if not all stakeholders are represented in deliberation, such that the outcome must later be justified to them.²⁵⁸ But what if all parties who would be bound by the decision did in

all affected parties’ preferences is not sufficient to consider a process or outcome democratically legitimate. As he explains: “Most [deliberative] theorists would include almost any kind of appeal” as a reason “provided that it is not *merely* or *finally* based on self or group interest.” Thompson, *supra* note 22, at 504 (emphasis added).

²⁵² See Gutmann, *supra* note 58, at 7.

²⁵³ *Id.*

²⁵⁴ See *id.* at 6; see also GUTMANN & THOMPSON, *supra* note 29, at 42 (arguing that de facto consensus is insufficient; there must be a “morally justified consensus”).

²⁵⁵ See Gutmann, *supra* note 58, at 8 (“An immoral negotiated resolution to a moral conflict in politics may be worse than going to war or no resolution at all.”).

²⁵⁶ *Id.*, at 7 (describing Fisher and Ury’s interest-based approach as “too purely proceduralist”); cf. Cohen, *supra* note 37, at 71 (noting that even in ideal bargaining conditions where differences in power were erased, it would be unreasonable to expect the common good to be advanced in a way that was fair).

²⁵⁷ See Gutmann, *supra* note 58, at 7, 9 (arguing that procedural fairness is not sufficient; the parties must also “assess the morality of the claims that people within a conflict make”). Cohen appears to be in agreement. See Cohen, *Procedure and Substance*, *supra* note 34, at 408 (arguing that the fact of reasonable pluralism does not limit us to pure procedural models of justice). Cohen has no problem accommodating interests as long as it is a reasonable accommodation—for example, one that is “fair” or that benefits the least advantaged group. See Cohen & Rogers, *supra* note 120, at 247; see also Freeman, *supra* note 216, at 393 (inferring that Cohen assumes an “independent criterion of justice” against which to measure deliberative outcomes).

²⁵⁸ Deliberative theorists sometimes seem to conceive of deliberation as being incompletely representative in this way. See, e.g., Gutmann, *supra* note 58, at 7 (envisioning a negotiation with Slobodan Milosevic that appears not to include ethnic Albanians and others who would nonetheless be impacted by the result). By contrast, consensus building practitioners could hardly ever envision proceeding in the absence of all parties in interest. See Susskind, *supra* note 164, at 22. Stakeholder involvement is a

fact participate (or were accurately represented)? Would an interest-based result reached with the free consent of all—but nothing more—meet deliberative standards? John Dryzek offers what is perhaps the clearest answer: “[E]ven if all conceivable interests are represented, the sum of their partial interests does not necessarily constitute the general public interest.”²⁵⁹ That is, even if we all want a particular result, it might not be what we *should* want in the sense that it is not in our “best” interests, however defined.²⁶⁰ This is understandable if we agree with the deliberativist that our interests are essentially untrustworthy and must be subjected to rational criticism. For then it would not seem to make a difference whether all or only some affected parties participated in the deliberation, because the interests remain unreliable in either case.²⁶¹ In the latter, we would not be able to justify the result to others. In the former, we would not be able to justify it to ourselves.

At this time, therefore, it is far from clear that deliberative theorists would endorse interest-based outcomes reached even with the full agreement of all affected parties.²⁶² True, some interest-based outcomes will pass

cardinal principle of consensus building, and IBDR practitioners expend a tremendous amount of time and effort to locate and include all possibly affected parties. *See* Susskind & Thomas-Larmer, *supra* note 146, at 101–05. This may point to an important structural difference in the type of process contemplated by the two fields. The goal of public IBDR projects is to reach a result by agreement (or near agreement), while the goal of deliberative democracy appears to be to defend the result against those who do not agree but who will be bound nonetheless. *Compare* Lawrence Susskind & Merrick Hoben, *Making Regional Policy Dialogues Work: A Credo for Metro-Scale Consensus Building*, 22 TEMP. ENVTL. L. & TECH. J. 123, 134–35 (2004) (noting the common aspiration of consensus building projects, often realized in practice, of achieving complete or near complete consensus and not simply majority rule) *with* Thompson, *supra* note 22, at 502 (describing “the fundamental problem [that] deliberative theory is intended to address” as how “collective decisions can be morally justified to those who are bound by them”).

²⁵⁹ A Reflection by John Dryzek, http://www.ocw.cn/NR/rdonlyres/Urban-Studies-and-Planning/11-969Summer-2005/D9DFC615-7786-4D1F-8812-DFA314930940/0/dryzek_ref.pdf (last visited Jun. 25, 2009). Dryzek gives the example of a complex environmental issue, in which some relevant interests—those of future generations, for example—simply cannot adequately be represented at the time of decision. *See id.*; *see also* Dryzek & Niemeyer, *supra* note 3, at 635.

²⁶⁰ This concern is implicit in the distinction Gutmann and Thompson make between prudence and reciprocity. Prudence, which the authors associate with bargaining and negotiation, insists only that the reasons offered for a particular outcome be mutually acceptable. *See* GUTMANN & THOMPSON, *supra* note 29, at 57. By contrast, reciprocity requires that reasons be both mutually acceptable and “recognizably moral in form.” *Id.*

²⁶¹ That is, “the mere fact of having a preference, conviction, or ideal does not by itself provide a reason in support of a proposal.” Cohen, *supra* note 37, at 76.

²⁶² This uncertainty is reflected in the debate (as of the time this article was written) between Jane Mansbridge and Joshua Cohen regarding the place of self-interest in

muster if they happen also to be justifiable with reasons. But we can only be certain that they do by asking a further question: Is what we all want, what we all should want? To the IBDR theorist, that question opens up a veritable Pandora's Box riddled with the challenges of relational conflict.²⁶³

Even if deliberative democrats were to respond that interest-based problem solving is consistent with or can complement deliberation, this is still not the same as giving it privileged status. Interest-based problem solving is the normatively optimal approach to conflict in an IBDR world.²⁶⁴ But in a deliberative democracy, it is at best an adjunct to the real work of deliberation—a device like voting that can help us reach the next best solution where continued deliberation is impracticable or unlikely to result in definitive agreement. In these circumstances, however, interest-based problem solving is no better or worse than positional argumentation. This is not to suggest that interests have no place in deliberative dialogue. Deliberative theorists acknowledge that needs and interests are important considerations that can never fully be excised from the discussion of public issues. Interests may indeed prove helpful in articulating and clarifying viewpoints, exposing hegemonic arrangements, and making people feel understood.²⁶⁵ Nor is deliberative dialogue to be conceived as a dry, legalistic, or technical process of argumentation devoid of emotional appeals.²⁶⁶ The point is simply that the result of deliberation may not be justified solely on the ground that it furthers the interest of a particular group or groups.

Further dialogue between IBDR scholars and deliberative democrats will be helpful in mapping precisely to what extent deliberative theory is prepared

deliberation. Mansbridge portrays Cohen's theory as unfairly excluding interest-based problem solving from what counts as "deliberation." See Mansbridge, *supra* note 212, at 122. Against Cohen, she argues that if a proposal is in the self-interest of all deliberating parties, and only those parties will be bound by the result, the mere fact of their uncoerced agreement (and nothing more) should be sufficient to confer democratic legitimacy on the result. *Id.* at 126.

Although I am largely sympathetic to Mansbridge's portrayal, for the reasons mentioned above, it is not entirely clear to me that she and Cohen are in material disagreement on this point. To my knowledge, Cohen has not yet responded to Mansbridge's argument, which is another reason why my own conclusions here remain tentative.

²⁶³ See *supra* notes 123–143 and accompanying text

²⁶⁴ Accepting, again, my simplification of IBDR theory. See *supra* notes 180–186 and accompanying text.

²⁶⁵ See Cohen & Rogers, *supra* note 120, at 247 ("[S]aying 'this policy is in my (my group's) interest(s)' is not itself a reason for adopting a policy, but again it may be very relevant information in choosing among different policies.").

²⁶⁶ See Thompson, *supra* note 22, at 505.

to embrace interest-based decisionmaking. Where reason-giving appears to have no hope of yielding a majority view (much less a consensus), I suspect that many deliberative theorists would be receptive to interest-based problem solving. Perhaps some already consider it to be an essential feature of their deliberative project. But incorporating interest-based approaches means importing the assumptions those approaches make about interests and conflict. This will have implications for several aspects of deliberative theory discussed in this article, including the relative importance of reasons over interests and the relationship between self-interest and the common good. Deliberative theorists should consider these implications seriously before taking a clear stand on interest-based problem solving.

C. *The Poverty of Reasons*

“Every rational creature, ‘tis said, is oblig’d to regulate his actions by reason; and if any other motive or principle challenge the direction of his conduct, he ought to oppose it, ‘till it be entirely subdu’d, or at least brought to a conformity with that superior principle.”

—David Hume²⁶⁷

On the account of deliberative democracy that I have given, what is paramount in deliberation is that the result be defensible by reference to reasons, as distinct from interests.²⁶⁸ Consider again the participant in the abortion workshop who was reluctant to give up her belief that life begins at conception.²⁶⁹ If confronted with good enough reasons against this position, in a perfect deliberative world the participant would acknowledge their merit and change her views accordingly. She would understand that if her reasons for opposing abortion do not persuade others, it means that those reasons are inadequate and that she should consider reevaluating her opposition to abortion.²⁷⁰ The assumption is that reasons are (in principle) a sufficient motor of action—even action that goes against deeply held interests.²⁷¹

²⁶⁷ DAVID HUME, A TREATISE OF HUMAN NATURE 413 (L.A. Selby-Bigge ed., 1896) (1739).

²⁶⁸ See *supra* notes 243–257 and accompanying text.

²⁶⁹ See *supra* note 210 and accompanying text.

²⁷⁰ See Cohen, *supra* note 37, at 77 (“[T]he discovery that I can offer no persuasive reasons on behalf of a proposal of mine may transform the preferences that motivate the proposal.”).

²⁷¹ Thus, Habermas has described the ideal process of argumentation as one in which participants are persuaded to accept or reject certain policies “solely by the force of the better argument.” Jürgen Habermas, *Richard Rorty’s Pragmatic Turn*, in ON THE

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

In this way, giving and accepting reasons turns out to be the manner in which we express our political commitment to each other in a deliberative democracy.²⁷² Good-faith attempts to justify our positions with reasons helps cultivate a distinctly deliberative sense of community, even in the face of profound differences and intractable conflicts.²⁷³ Arguing about what we should all value, rather than finding ways jointly to pursue what we are each already committed to, is the way we demonstrate mutual respect and good citizenship. By the same token, an unwillingness or inability to provide reasons that are acceptable to others signifies bad faith—the lack of motivation to find “fair terms of cooperation.”²⁷⁴

The flip side of this is that reason-giving is also the extent of our commitment to each other in the public sphere. When resolving conflicts in order to reach decisions, deliberative citizens owe one another nothing more than reasons and expect nothing more in return.²⁷⁵ This is well captured in Gutmann and Thompson’s notion of reciprocity—what they refer to as the “leading principle” of deliberative democracy.²⁷⁶ Reciprocity describes a certain type of constructive orientation in the face of difference and disagreement. But instead of empathy or mutual understanding, which involve probing the other’s perspective and interests in a nonjudgmental way, Gutmann and Thompson conceive of reciprocity in terms of practices of

PRAGMATICS OF COMMUNICATION 343, 367 (Maeve Cooke ed., 1998); see also JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION 25 (Thomas McCarthy trans., 1984) (arguing that participants in an ideal speech situation necessarily presuppose that it excludes all force except that of the “better argument”). Similarly, Gutmann and Thompson contend that reciprocal reason-giving can cause people to take action on what they believe to be right, even if it conflicts with their self-interest. See GUTMANN & THOMPSON, *supra* note 29, at 48. By the same token, Cohen’s second principle of deliberation assumes that non-self-interested reasons are sufficient to motivate decisions. See Cohen, *supra* note 37, at 74; see also Cohen, *supra* note 33, at 199 (“Citizens are capable of recognizing as *reasons* considerations that conflict with their antecedent preferences and interests . . . and acting on those [considerations].”).

²⁷² This is what Gutmann has referred to as the noninstrumental value of deliberation. Gutmann, *supra* note 58, at 2, 6.

²⁷³ See Dennis F. Thompson, *Public Reason and Precluded Reasons*, 72 FORDHAM L. REV. 2073, 2078 (2004) (giving public reasons is “a significant affirmation of the kind civility [sic] that a deliberative democracy should try to sustain”); see also Cohen, *Deliberative Democracy*, *supra* note 22, at 228; Cohen, *Procedure and Substance*, *supra* note 34, at 416.

²⁷⁴ GUTMANN & THOMPSON, *supra* note 29, at 78.

²⁷⁵ Cf. Cohen & Sabel, *supra* note 20, at 327 (“Citizens contemplating the exercise of collective power owe one another reasons, and owe attention to one another’s reasons.”).

²⁷⁶ See GUTMANN & THOMPSON, *supra* note 29, at 52.

respectful argumentation. On their view, we argue reciprocally when we appeal to reasons that are “accessible” to others in the sense that they are framed in terms that are understandable to, and could be accepted by, all.²⁷⁷

For example, a religious sect’s claim that abortion should be illegal simply because God says so violates the principle of reciprocity because it cannot be considered “on [the] merits”²⁷⁸ or be subjected to “standards of logical consistency or to reliable methods of inquiry”²⁷⁹ that are shared by all. Instead, it requires us to take a leap of faith in order fully to understand and evaluate whether, why, and how God requires such an outcome.²⁸⁰ In this sense, the “God says so” rationale is solipsistic—inaccessible to atheists, agnostics, and sectarians who hold different views about God’s imperatives.

Similarly, my bare insistence that a certain need of mine is unique or fundamental to my identity—something I simply cannot live without—is non-reciprocal and will therefore fail to move my fellow deliberators.²⁸¹ Why? According to Gutmann and Thompson, it is because deliberators (unlike bargainers) do not make decisions based on the “strength and intensity of [their] interests.”²⁸² Moreover, according to Cohen they are only required to give my needs “the same weight in their deliberations that they insist I give to theirs.”²⁸³ Since we have already established that their interests do not count as sufficient reasons to me, neither are mine to them. Even model deliberative citizens would therefore be perfectly justified in rejecting my need- or interest-based claim (unless, of course, I can identify some non-self-interested reason why those needs require satisfaction).²⁸⁴

By contrast, the claim that certain passages in the Bible explicitly prohibit abortion would satisfy Gutmann and Thompson’s test of reciprocity because such a claim, even though religiously inspired, is open to criticism even to atheists who deny the authority of the Bible. For example, non-religionists could argue that such a reading of the Bible is implausible

²⁷⁷ See GUTMANN & THOMPSON, *supra* note 59, at 147 (emphasis added). Cohen makes a similar point when he says that deliberation requires giving “considerations that others regard as relevant and appropriate.” Cohen & Sabel, *supra* note 20, at 321.

²⁷⁸ GUTMANN & THOMPSON, *supra* note 29, at 64.

²⁷⁹ *Id.* at 56.

²⁸⁰ See *id.* at 57; Thompson, *supra* note 273, at 2084.

²⁸¹ See Cohen, *supra* note 37, at 76 (“[Other deliberators] cannot be expected to regard my preferences as sufficient reasons for agreeing.”).

²⁸² GUTMANN & THOMPSON, *supra* note 29, at 64.

²⁸³ Cohen, *supra* note 33, at 197.

²⁸⁴ See Cohen, *supra* note 37, at 76 (“[T]he mere fact of having a preference, conviction, or ideal does not by itself provide a reason in support of a proposal.”).

because much of the Bible simply cannot be understood literally.²⁸⁵ Similarly, the claim that there are alternative, nonreligious reasons to support an injunction against abortion—for example, that it is “written in every human heart [and] knowable by reason itself”—is also a religiously-based claim that is properly framed in reciprocal terms.²⁸⁶ As Cohen explains, here we can at least argue about reason instead of a particular religious worldview. For example, we could claim that such a conception of reason is partisan or sectarian, or simply implausible.²⁸⁷

Gutmann and Thompson apply these arguments in their analysis of the case of *Mozert v. Hawkins County Board of Education*.²⁸⁸ In that case, a group of Christian fundamentalist parents challenged the use of a Holt, Rinehart and Winston basic reading series in the Hawkins County, Tennessee public school system. The Holt readers were designed to teach grade school children “critical reading” skills, understood to include not just reading, but also the ability to evaluate the subject matter and to form independent judgments.

Yet it was precisely the development of a capacity for critical reasoning to which the fundamentalist parents objected.²⁸⁹ They argued that mere exposure to the Holt series offended their religion because it encouraged the children to form their own opinions about certain issues such as the origin of the species, the killing of animals, and gender roles, for which the Bible already provided an unassailable answer.²⁹⁰ From their point of view, the teaching of an alternative philosophy or viewpoint was tolerable only if the children were “instructed to [the] error [of the other philosophy].”²⁹¹ The

²⁸⁵ As Gutmann and Thompson explain: “Many of [the Bible’s] claims are implausible if taken literally, not only according to well-established scientific standards but also according to the more general beliefs and practices of those who rely on the authority of the Bible.” GUTMANN & THOMPSON, *supra* note 29, at 56.

²⁸⁶ See Cohen, *supra* note 33, at 196.

²⁸⁷ See *id.*

²⁸⁸ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). For an exhaustive and illuminating analysis of the *Mozert* case, see Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993).

²⁸⁹ See *Mozert*, 827 F.2d at 1069 (“[O]ne plaintiff did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer.”).

²⁹⁰ See *id.* at 1062 (“[T]he plaintiff parents objected to passages that expose their children to other forms of religion”); *id.* at 1076 (Boggs, J., concurring) (“The plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs.”).

²⁹¹ *Id.* at 1064.

Sixth Circuit denied the parents' free exercise claim on the ground that "mere exposure" to diverse ideas in the Holt series did not burden the parents' or their children's right to exercise their religion.²⁹²

Gutmann and Thompson argue that the fundamentalist parents' objections to the Holt readers are non-reciprocal, and therefore intolerable, because they deny the children the opportunity to acquire the critical skills that are necessary for making reciprocal claims in the first place.²⁹³ Any denial of the conditions for the possibility of reciprocity, they conclude, cannot itself be a reciprocal claim.²⁹⁴ Dennis Thompson explains: "No parent in a democratic society should be granted, on the basis of an esoteric Biblical interpretation, the power to deny their children the opportunities for future democratic citizenship that other children enjoy."²⁹⁵

Because they are prepared to resolve the issue based solely on the non-reciprocal form of the *Mozert* parents' arguments, Gutmann and Thompson's model deliberators are unlikely to mine deeper levels of the conflict in order to understand what is truly at stake for the parents and the school board. They have no reason to empathize with the parents' dilemma of choosing between a public school education for their children and obeying the word of God. This lack of understanding of each side's deeper interests keeps the deliberation stuck at the level of competing and apparently irreconcilable positions.²⁹⁶ on the one hand, the school board's assertion that critical reading is essential to prepare the children for democratic citizenship, and on the other, the parents' non-reciprocal explanation that it sentences the children to eternal damnation. In other words, Gutmann and Thompson would take the parties' stated positions at face value, when the true conflict likely lies below the surface, at the deeper level of needs and interests.²⁹⁷

A look at the interests underlying these positions gives way to a very different picture. At stake for the school board was surely not the importance

²⁹² See *id.* at 1067, 1069–70.

²⁹³ GUTMANN & THOMPSON, *supra* note 29, at 65.

²⁹⁴ *Id.*

²⁹⁵ Thompson, *supra* note 273, at 2078. As Gutmann and Thompson see it, "[t]he parents' reasoning appeals to values that can and should be rejected by citizens of a pluralist society committed to protecting the basic liberties and opportunities of all citizens." GUTMANN & THOMPSON, *supra* note 29, at 65.

²⁹⁶ As concurring Judge Boggs described it: "The school board argues that 'critical reading' is something so special that in the words of [the school board's expert, Dr.] Farr, 'it would be almost impossible to [teach critical reading consistent with the plaintiffs' religious objections].'" *Mozert*, 827 F.2d at 1077 (Boggs, J., concurring) (emphasis added).

²⁹⁷ See FRIEDMAN & HIMMELSTEIN, *supra* note 123, at 106–08, 117–18; Northrup, *supra* note 60, at 57.

of the Holt reader or even of critical reading per se. Rather, it was to ensure that students “develop[] . . . higher order cognitive skills” so that they can “succeed in other subjects and . . . function as effective participants in modern society.”²⁹⁸ This general interest, moreover, was shared by the plaintiffs, who had stipulated to the school board’s compelling interest in educating the children for citizenship (but not necessarily by use of the Holt readers).²⁹⁹ Although he did not use the vocabulary of positions and interests, Sixth Circuit Judge Boggs echoed this point in his concurring opinion. He claimed that the majority had placed too much emphasis on each side’s positions—“on references that make plaintiffs appear so extreme that they could never be accommodated.”³⁰⁰ In his view, the court had privileged “want[s]” rather than needs.³⁰¹ As a result, he concluded that the “underlying issues” were effectively buried for another day.³⁰²

Both sides in the *Mozert* dispute could have found their shared interests furthered through an accommodation that allowed the children to opt out of the school’s reading program but that required the children to pass the same equivalency tests that non-public school students must take in order to demonstrate acquisition of the minimum skills expected of all Tennessee

²⁹⁸ *Mozert*, 827 F.2d at 1060; see also *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194, 1200 (E.D. Tenn. 1986), *rev’d*, 827 F.2d 1058 (6th Cir. 1987) (articulating the state’s real interest as furthering “the education of its young”). These underlying interests can also be gleaned from Judge Cornelia G. Kennedy’s concurring opinion, in which she described the state’s ultimate objectives in terms of “preparing public school students for citizenship and self-government,” “inculcating in the students the habits and manners of civility,” and “prepar[ing] students for life in a complex, pluralistic society.” *Mozert*, 827 F.2d at 1071 (Kennedy, J., concurring). In support of her position, Judge Kennedy cited *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), where the U.S. Supreme Court declared that the public school system “must ‘inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.’” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citing *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

The fact that critical reading skills per se were not the school board’s primary concern was further suggested by the school board’s admission that acquisition of critical reading skills is extremely difficult to measure, and thus that there was no way to know whether the Holt series was actually helping the plaintiffs’ children acquire critical reading skills. See *Mozert*, 827 F.2d at 1077 (Boggs, J., concurring) (quoting testimony of the school board’s expert, Dr. Farr).

²⁹⁹ *Id.* at 1061.

³⁰⁰ *Id.* at 1074 (Boggs, J., concurring).

³⁰¹ *Id.* at 1075 (Boggs, J., concurring).

³⁰² *Id.* at 1074 (Boggs, J., concurring).

citizens.³⁰³ As concurring Judge Boggs noted, this was “all [the plaintiffs] have ever asked for in their pleadings, in the arguments at trial and in appellate briefing and argument.”³⁰⁴ Indeed, case-by-case accommodations had successfully been negotiated between parents and school officials both before and even *after* the school board voted unanimously to eliminate opt-outs from the reading program,³⁰⁵ suggesting that those accommodations were both highly desirable and workable for all involved. Moreover, as Judge Boggs noted, nothing in the record suggested that the accommodations were inadequate to further the school board’s goal of educating children for citizenship.³⁰⁶

Gutmann and Thompson would not be swayed by these arguments, however. For them, a mere agreement on ad hoc accommodations is insufficient. The agreement must also be fair, which is to say justifiable by reference to reciprocal reasons.³⁰⁷ Gutmann and Thompson imply that the parents and the school board are better off continuing to exchange reciprocal reasons until the parents ultimately realize that they have no reasonable basis on which to challenge the use of the Holt series.³⁰⁸

From an IBDR perspective, extending the process of argument and reason-giving at the expense of deepening the understanding of underlying interests is only likely to create more relational conflict. Indeed, it was precisely because the school board took such a principled approach that the individually negotiated accommodations were undone and the parties were forced into a bitter, four-year long litigation. The irony of this situation was not lost on concurring Judge Boggs:

³⁰³ Such a solution was in fact suggested by concurring Judge Boggs. *See id.* at 1077 (Boggs, J., concurring).

³⁰⁴ *Mozert*, 827 F.2d at 1075 (Boggs, J., concurring).

³⁰⁵ *See id.* at 1075 (Boggs, J., concurring). One of the plaintiffs, Vicky Frost, negotiated an accommodation whereby Christian fundamentalist students could leave the classroom during reading sessions and study from a different textbook. *Id.* at 1060. Similar accommodations were apparently negotiated in two other elementary schools. *Id.*

³⁰⁶ *See id.* at 1074 (Boggs, J., concurring) (noting that there was “no evidence whatsoever” to that effect). Likewise, the trial court found that a reasonable accommodation of the plaintiffs’ needs that did not offend the Establishment Clause would have been to grant the children an opt-out just from the Holt reading program. *Mozert*, 647 F. Supp. at 1203. This was especially persuasive given that Tennessee already had a home schooling statute that permitted an even more capacious exception: a complete opt-out from the public school curriculum. *See id.* (citing TENN. CODE ANN. § 49–6–3050 (1986)).

³⁰⁷ *See supra* notes 250–257 and accompanying text.

³⁰⁸ *See supra* notes 293–295 and accompanying text.

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

For myself, I approach this case with a profound sense of sadness. At the classroom level, the pupils and teachers in these schools had in most cases reached a working accommodation. Only by the decisions of higher levels of political authority, and by more conceptualized presentations of the plaintiffs' positions, have we reached the point where we must decide these harsh questions today. . . .

. . . .

As this case now reaches us, the school board rejects any effort to reach out and take in these children and their concerns.³⁰⁹

In certain types of conflicts, it appears, an insistence on reasons may be a poor alternative to the negotiation of interests.

D. Public Reasoning as Adjudication

"[I]n a constitutional regime with judicial review, public reason is the reason of its supreme court."

—John Rawls³¹⁰

The conclusions from the previous section point to the broader implications for IBDR of deliberative democracy's emphasis on reason-giving—implications that have perhaps gone underestimated. As John Dryzek explains, deliberation is at root a process of disciplining dialogue according to "rational standards."³¹¹ These standards are understood by deliberative theorists (especially those influenced by Rawls)³¹² to be more or less widely shared—a type of "common reason"³¹³ whose validity and

³⁰⁹ *Mozert*, 827 F.2d at 1073–74 (Boggs, J., concurring).

³¹⁰ RAWLS, *supra* note 32, at 231 ("[T]he supreme court is the branch of government that serves as the exemplar of public reason.").

³¹¹ DRYZEK, *supra* note 199, at 167. Similarly, Cohen notes that the reason-giving requirement is "a thread that runs through much of the literature on deliberative democracy." Cohen, *Deliberative Democracy*, *supra* note 22, at 221.

³¹² Here I refer particularly to Cohen, Gutmann, and Thompson. Although Sunstein's overall argument is not inconsistent with the concept of public reason, his fidelity to such a concept is uncertain to me. This is no doubt a function of the fact that Sunstein approaches deliberative democracy from the traditions of civic republicanism and American constitutionalism, whereas his colleagues approach it from the tradition of Anglo-American political theory—especially the Kantian branch of that tradition that emphasizes the importance of public reason-giving.

³¹³ Cohen, *Deliberative Democracy*, *supra* note 22, at 220; *see also* GUTMANN & THOMPSON, *supra* note 29, at 25 (arguing that citizens in a deliberative democracy "appeal to reasons that are shared or could come to be shared" by all others); *id.* at 55; *cf.* Sunstein, *supra* note 37, at 1554 (describing the republican commitment to "universalism" as a faith in the "possibility of mediating . . . different conceptions of the

persuasiveness are acknowledged or acknowledgeable to all people in their capacity as citizens of a liberal democracy, no matter what the comprehensive doctrines to which they subscribe.³¹⁴ Rawls referred to these standards as “public reason.”³¹⁵

There are varying accounts of the nature and scope of public reason. Samuel Freeman provides some examples: “According to one account, public reasons are the neutral reasons that people share in common in a democracy. According to another, they are the considerations that fully rational and informed persons with diverse values rely on in a procedure of ideal discourse.”³¹⁶

The thread running through all of these accounts is that public reason is a distinctly political concept.³¹⁷ It does not purport to be a universal principle that speaks to all societies in all periods of time. Neither does it pretend to be consistent with all comprehensive doctrines. It does not even promise consensus, for reasonable minds can disagree about the relevant weight of different public reasons.³¹⁸ Rather, public reason expresses the idea of the minimal terms of political cooperation and coexistence necessary to sustain the uniquely Western, liberal-democratic project.³¹⁹

public good” through deliberation). Cohen concedes, however, that “the availability of such shared reason may itself be in doubt.” Cohen & Rogers, *supra* note 120, at 242.

³¹⁴ According to Samuel Freeman, the notion of a shared norm of reason that operates within the public sphere is a “central” theme in most prominent accounts of deliberative democracy. See Freeman, *supra* note 216, at 377, 396.

³¹⁵ Rawls believed that although there are “many nonpublic reasons” there is only “one public reason.” RAWLS, *supra* note 32, at 220. Most deliberative democrats would not go that far, however. See Bohman, *supra* note 3, at 262 (arguing that in light of reasonable pluralism, Rawls’s conception of public reason as singular should give way to a conception of “plural public reason”); cf. Thompson, *supra* note 273, at 2082–84 (arguing that public discourse should be open not just to claims of public reason but also to those of overlapping comprehensive doctrines).

³¹⁶ Freeman, *supra* note 216, at 396.

³¹⁷ *Id.* at 373, 379, 382.

³¹⁸ See Cohen & Rogers, *supra* note 120, at 242.

³¹⁹ See Freeman, *supra* note 216, at 398 (explaining that Rawls’s conception of public reason “presumes that citizens . . . are committed to maintaining” democratic institutions); Thompson, *supra* note 273, at 2074 (observing that the concept of public reason is in large part animated by the “values of a stable democracy”).

This should raise immediate concerns for consensus building and dispute resolution practitioners working abroad, within or among countries that would not be considered liberal democracies. See e.g., Hiram E. Chodosh et al., *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach*, 17 MICH. J. INT’L. L. 865 (1996) (recommending alternative dispute resolution mechanisms as a way of addressing backlogs in the Egyptian court system). If dispute resolution practices and techniques are just scaled down versions of a model of public reasoning that has deep moorings in

It is in the metaphorical town hall of public reason that deliberative citizens from diverse walks of life, speaking unrelated tongues, come together in a neutral forum to work out their conflicts. They demonstrate mutual respect by translating their vernacular concerns into a dialect of reasons intelligible to all.³²⁰ Some of their native idioms inevitably creep back into the conversation, but when they do they will be treated like hearsay and other untrustworthy forms of evidence³²¹ that tend, to use Meiklejohn's expression, to "mutilat[e] the thinking process."³²² Such evidence will certainly not pass unnoticed by the deliberators and may very well influence the deliberation.³²³ But idioms that cannot be expressed in the grammar of public reason may not form the basis of the final decision.

There is an undeniable beauty to this picture. It describes a world in which power is disciplined by requiring each of us to justify our claims according to shared norms of argumentation, and in this way to show respect for all others as "free and as equal participants in public life."³²⁴ This is a world that generally embraces pluralism, requiring that only public, political claims be articulated in a neutral vocabulary of reasons that can be evaluated on equal footing by all. And as long as certain deliberative minima are satisfied—the discussion is reasoned, each group has an equal opportunity to present its arguments, and the winning idea is supported with "considerations that others regard as relevant and appropriate"—those who disagree with the result "can scarcely contest the fundamental legitimacy of the decision."³²⁵ Losers in the deliberative process "should [therefore] try to understand that

Western, liberal-democratic thought, what are the implications of teaching and implementing them through ADR pilot programs in societies that are neither liberal nor democratic? This type of concern should lead IBDR scholars and practitioners to re-think the degree to which they should align themselves with deliberative democracy.

³²⁰ See *supra* note 39 and accompanying text.

³²¹ See Thompson, *supra* note 273, at 2075 (following Rawls in analogizing public reason to exclusionary rules of evidence).

³²² See *supra* note 75 and accompanying text.

³²³ See *supra* note 265 and accompanying text.

³²⁴ Freeman, *supra* note 216, at 398. The concept of disciplining power by reason is a central theme in the deliberative literature, and it has important implications for IBDR. See, e.g., GUTMANN & THOMPSON, *supra* note 59, at 46 (presenting deliberation as "one of the most effective" ways "to publicly expose the unjustified exercise of political power"); Cohen, *Deliberative Democracy*, *supra* note 22, at 221 ("[The] emphasis on subjecting power to reason's discipline is a thread that runs through much of the literature on deliberative democracy."); Sunstein, *supra* note 37, at 1550 (describing power as the "antonym" of deliberation and arguing that the purpose of deliberation is to exclude it). For purposes of this article, I ask readers to bracket the question of power as far as possible, as it deserves a far more detailed discussion than I can offer here.

³²⁵ Cohen & Sabel, *supra* note 20, at 321.

when their claims are rejected because they fall outside the limits of public reason, they are not being treated unfairly.”³²⁶

The *Mozert* plaintiffs are a case in point. To deliberative democrats, the *Mozert* plaintiffs’ inability to convey their unique perspectives in terms of public reason is not a healthy sign of pluralism—something that inspires us to find creative solutions around undeniable, sometimes inexorable needs and interests. Instead, it is a sign of bad citizenship, and deliberative democracies have little patience for errant citizens.³²⁷ They have few resources with which to build their dissenters what negotiation expert William Ury has called “a golden bridge.”³²⁸ Thus, Freeman explains that in a deliberative democracy:

[T]here is no assumption that Social Darwinists, religious fundamentalists, slave holders, or Nazis are amenable to public reason, nor should any effort be made to accommodate their views. These doctrines could not be affirmed by reasonable persons wanting to justify their relations in terms that others can reasonably accept. . . . There is no requirement that they be respected or accommodated by public reason.³²⁹

If they cannot learn our *lingua franca*, therefore, we are entitled to exclude them from deliberation.³³⁰

By contrast, IBDR’s philosophy has always been one of including all stakeholders. Conflict resolvers have ventured to talk with those whom

³²⁶ Thompson, *supra* note 273, at 2078; *see also* GUTMANN & THOMPSON, *supra* note 29, at 41–42 (suggesting that, even if citizens do not get what they need or “receive less than they deserve,” they are likely to accept the will of government or the majority if it is the result of deliberation).

³²⁷ *See* GUTMANN & THOMPSON, *supra* note 29, at 55 (“[Deliberative democracy] cannot reach those who refuse to press their public claims in terms accessible to their fellow citizens.”).

³²⁸ *See* URY, *supra* note 123, at 105–29 (suggesting that when disagreement leads to impasse, continuing to press one’s viewpoint is ineffective; instead, the effective negotiator should “build a golden bridge”—demonstrate to the other side how and why a proposed agreement is in their interest, for example).

³²⁹ Freeman, *supra* note 216, at 401–02; *see also* Gutmann, *supra* note 63, at 72 (arguing that the claims of extremists should be rejected).

³³⁰ On the exclusionary aspects of Gutmann and Thompson’s requirement of reciprocity, *see* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2283–93 (1997). A rebuttal of Fish’s critique can be found in Amy Gutmann & Dennis Thompson, *Democratic Disagreement*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 243, 257–59 (Stephen Macedo ed., 1999).

others had long left for fanatical, irrational, or inhuman.³³¹ They have even engaged neo-Nazis, as in the well-known Skokie controversy where, against all expectations, mediators from the U.S. Department of Justice's Community Relations Service³³² helped avoid a potentially disastrous confrontation between Frank Collin's neo-Nazi group and the Jewish community. Behind the scenes, mediators Richard Salem and Werner Petterson relied on negotiation and interest-based dialogue (among other IBDR techniques) to discern the neo-Nazis group's deeper interests and to suggest an alternative venue for the proposed march in a way that both vindicated Collin's free speech rights and allayed the municipality's concerns about safety and security.³³³

What informs IBDR's philosophy of inclusion in these cases is the conviction that the stated positions of contending parties are never the whole picture and thus cannot be taken at face value; that beneath heinous doctrines such as Nazism and apartheid are genuine interests—what free speech scholar Thomas Emerson once referred to as “real grievances, which should be heard and heeded.”³³⁴ According to David Hamlin (one of the ACLU lawyers who defended Collin in the Skokie case), at the end of the day, the basic interests of white “freedom fighters” like Collin may not have been all that different from the interests of upwardly mobile African Americans, Eastern European immigrants to the Chicago area, and even Skokie residents.³³⁵ Only through understanding and interest-based dialogue can these underlying drivers of conflict be unearthed and dealt with in a lasting and satisfying manner.

The exclusionary aspect of public reason is important because it suggests the way that deliberative democracy's approach to conflict is in certain crucial respects closer to the adjudicative than the consensual paradigm of dispute resolution. In deliberative democracies, like courts of law, some

³³¹ Susskind and Field, for example, have long contended, “It simply doesn't matter whether you think that someone else's anger is rational or irrational. Someone else's behavior may appear bizarre to you, but from where they are standing, zealots see their outrage as quite logical and rational.” SUSSKIND & FIELD, *supra* note 143, at 18.

³³² See generally Community Relations Service Homepage, <http://www.usdoj.gov/crs/> (last visited Jun. 25, 2009).

³³³ See DAVID HAMLIN, THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE 165–75 (1980) (describing the work of federal mediators). See generally Richard A. Salem, *Mediating Political and Social Conflicts: The Skokie-Nazi Dispute*, MEDIATION Q., Sept. 1984, at 65 (describing the Skokie mediation efforts).

³³⁴ THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 52 (1970).

³³⁵ See HAMLIN, *supra* note 333, at 9.

reasons are simply better than others.³³⁶ Public reasons trump private reasons. Constitutional reasons carry greater weight than policy reasons.³³⁷ Certain reasons are “precluded” in order to promote some values over others.³³⁸ And some reasons will never be considered because they are embedded in objectionable doctrines such as slavery that are automatically excluded as beyond the pale of deliberative consideration.³³⁹

To be sure, deliberative democracy needs something like a conception of fair adjudicative procedure—a principled process of reasoning and decisionmaking—because it aims at reaching legitimate judgments that are binding on all, including those who did not consent to the deliberative result. But the emphasis on justification suggests how deliberation is less an open-ended discussion and more the kind of disciplined dialogue that prevails during an appellate oral argument, or in a post-hearing conference among panel judges. This dialogue may be punctuated by bursts of comedy or tragedy, and may well include a consideration of the parties’ underlying interests. In the final analysis, however, interests are not sufficient to affirm or reverse a verdict. Instead, appellate judges must provide adequate reasons in order legitimately to impose their conclusions on losing parties (and on the rest of us in the form of binding precedent).

IBDR theorists and practitioners would surely find the adjudicative quality of deliberation hard to swallow. Adjudication produces winners and losers; it has no hesitations about imposing solutions on “unreasonable” parties; it offers no guarantee that the human aspects of conflict will be resolved in way that addresses the deep and powerful interests at stake. In adjudication, what is ultimately important is not whether we embrace the result but merely whether we can comprehend and consider legitimate the reasoning process that led to it—even or especially if we disagree.³⁴⁰

By contrast, for IBDR the legitimacy of a result depends on the extent to which the underlying interests of all have been furthered through a free,

³³⁶ See GUTMANN & THOMPSON, *supra* note 29, at 17 (contending that deliberative democracy “certainly does not accept as equally valid whatever reasons” we advance in defense of our interests); Cohen & Sabel, *supra* note 20, at 327 (“[N]ot all reasons are on a par.”).

³³⁷ See Cohen & Sabel, *supra* note 20, at 327.

³³⁸ See Thompson, *supra* note 273.

³³⁹ Thus, Sunstein argues that in a deliberation about affirmative action, it is nonsensical to include “people who think that slavery was good and should be restored.” Sunstein, *Deliberative Trouble*, *supra* note 92, at 115. From an IBDR perspective, however, there are likely to be deeper interests animating such views about slavery—interests that may well be legitimate and that deserve to be better understood.

³⁴⁰ See Freeman, *supra* note 216, at 398; see also *supra* notes 325–326 and accompanying text.

voluntary, and above all consensual process.³⁴¹ The task is not to find good enough reasons that provide us with a warrant to compel our solutions on others—those we consider lunatics or enemies, and who, in turn, look at us in the same light.³⁴² Rather, it is to realize that in an increasingly globalized environment, we are stuck with each other; that we have no real choice but to work with the Hitlers and Ahmadinejads of the world if we seek to forge genuine arrangements that have any durable hope of managing conflict.³⁴³

Instead of pragmatism, deliberative democrats see in this state of affairs an abysmal relativism. Without authoritative standards of public reason, they fear, we risk becoming unable to distinguish democracy from slavery, order from anarchy.³⁴⁴ But relativism is a problem only if we think that conflict management requires establishing the validity of certain claims or procedures over others, as a way of forcing our opponents to agree with us or at least to work with us toward agreement. To deliberative theorists, therefore, conflict resolution in the public sphere cannot get off the ground unless we can justify through disciplined reason-giving that certain doctrines like liberal democracy are morally superior to others like Nazism.

Unlike deliberative democracy, IBDR is not in the business of justification. The question is not whether heinous doctrines like Nazism can be proven wrong (they obviously are). Rather, it is why some people like Frank Collin, whose own father was a Holocaust survivor,³⁴⁵ have the need

³⁴¹ Kelman describes this philosophy of IBDR as follows: “Insofar as [disputants] arrive at a solution that addresses the fundamental needs of both parties, justice is being done—not perfect justice, but enough to ensure the prospects for a durable peace.” Kelman, *supra* note 147, at 67–68; *see also* Menkel-Meadow, *supra* note 175, at 157 (“[N]egotiated justice may be better than legal justice in many, if not all, cases.”).

³⁴² *See* Morton Deutsch, *Mediation and Difficult Conflicts*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE, *supra* note 126, at 355, 361.

³⁴³ *See* FISHER ET AL., *supra* note 179, at 19 (contending that understanding the interests—even of those at the “moral margin” like Hitler—is essential for effective conflict management); David W. Johnson et al., *Constructive Controversy: The Value of Intellectual Opposition*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 127, at 69, 75 (Morton Deutsch et al. eds., 2d ed. 2006) (arguing that to manage conflict skillfully, the following norm is helpful: “I remember that we are all in this together, sink or swim. I focus on coming to the best decision possible, not on winning.”); *cf.* Morton Deutsch, *Cooperation and Competition*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 127, at 23, 34 (arguing that resolution requires framing the conflict as a “mutual problem”).

³⁴⁴ *See, e.g.*, GUTMANN & THOMPSON, *supra* note 59, at 47 (arguing that, without standards of justification, there would be no way to distinguish between “arguments for civic equality and racial inferiority,” and democracy would be no better than fascism).

³⁴⁵ *See* HAMLIN, *supra* note 333, at 5–8.

to advocate them. The goal is to understand and satisfy the underlying interests, not the positions through which they are expressed.

Another way of thinking about this is suggested, again, by Gilligan's research in moral development. Deliberative theorists (like Jake) fear unfair domination and abuses of power.³⁴⁶ They would frame Heinz's dilemma in terms of the priority of life over property; they would worry about the injustice to Heinz if the druggist's self-interest and greater resources are allowed (quite arbitrarily) to determine Heinz's fate. By contrast, IBDR theory sees the world more as Amy does. From this perspective, the problem is not so much the druggist's power or even his self-interested profit motive. Rather, it is the failure of *both* Heinz and the druggist fully to understand and empathize with each other's true needs.³⁴⁷ Girls like Amy set out to include the druggist and his interests in a creative resolution of the conflict—as Gilligan put it, they “respond to the druggist's need in a way that would sustain rather than sever connection.”³⁴⁸ They want to “talk it out and find some other way to make the money” so that Heinz can save his wife *and* so that the druggist can make a profit.³⁴⁹ In short, they advocate an authentic negotiation over interests, not adjudication or ordering of positional claims.

V. CONCLUSION

“[A] bargain is often the better part of political wisdom.”

—Michael Walzer³⁵⁰

In this article, I have sought to question the assumption, not uncommon within IBDR circles, that deliberative democracy and dispute resolution are united by a common purpose or method. By taking a critical look at the work of some of deliberative democracy's foremost promoters, including Joshua Cohen, Amy Gutmann, Dennis Thompson, and Cass Sunstein, I conclude that the vision of democracy advocated by these theorists is at odds with IBDR's orientation to conflict—its understanding of the nature of conflict,

³⁴⁶ For example, they are concerned that the *Mozert* plaintiffs use religion to deprive their children of skills necessary for democratic citizenship. See GUTMANN & THOMPSON, *supra* note 29, at 65; Thompson, *supra* note 273, at 2078. This is similar to the concerns of ADR critics who worry that unequal relations of power are unjustly perpetuated in informal negotiation and dispute resolution processes in a way they are not in courtroom litigation. See *supra* note 4.

³⁴⁷ See Gilligan, *supra* note 50, at 722.

³⁴⁸ *Id.* at 697.

³⁴⁹ *Id.*

³⁵⁰ Michael Walzer, *Deliberation, and What Else?*, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT, *supra* note 330, at 58, 62.

the relationship between conflict and discourse, and the role that human interests should play in the proper handling of disputes.

To be sure, principles of IBDR and deliberative democracy have managed to find joint expression in consensus building and public dialogue projects on the ground. Many such initiatives claim inspiration not just from one but both fields. Far from implying a curtain call to the collaboration that has happily developed between the two nascent fields, it is my hope that this article will signal the beginning of a second act. Nonetheless, if I am correct that deliberative democracy theory is at variance with certain important aspects of IBDR's normative project, this should surely raise questions for IBDR theorists and practitioners alike who consider their work to be an unproblematic expression of deliberative democratic values.

Here I wish to suggest that IBDR theorists also consider looking beyond deliberative democracy to alternative models for inspiration. New governance is one such alternative that holds great promise, as several IBDR scholars have already discovered.³⁵¹ Another possibility is suggested by participatory models of democracy, examples of which can be found in the work of scholars such as Jane Mansbridge³⁵² and Iris Marion Young,³⁵³ both of whom have emphasized the importance of conflict and human interests in a way that resonates deeply with the IBDR project.

But a more obvious candidate bears mentioning here, one that places conflict and the negotiation of human interests at the heart of political theory. That is the philosophy of *modus vivendi*, which has curiously been overlooked by much recent IBDR scholarship.³⁵⁴ For *modus vivendi*, like IBDR, conflict is a permanent, constitutive feature of any political

³⁵¹ See generally Bingham et al., *supra* note 108; Cohen, *New Governance*, *supra* note 22. Although new governance traces some of its intellectual roots to deliberative democracy, its pragmatist orientation has allowed problem solving and interest-based discourses to play a more prominent role in the service of popular, participatory self-government.

³⁵² See Jane Mansbridge, "Deliberative Democracy" or "Democratic Deliberation"?, in *DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN?*, *supra* note 3, at 251, 261–67 (arguing for a "deliberative neo-pluralism" that would include interest-based dispute resolution and negotiation). See generally Mansbridge, *supra* note 212 (arguing that deliberative democracy theory must take account of self-interest and conflict).

³⁵³ See Iris Marion Young, *Difference as a Resource for Democratic Communication*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, *supra* note 34, at 383, 400 (advocating a conception of deliberative democracy as a "form of practical reason for conflict resolution and collective problem solving" that does not require justifying our pre-given interests).

³⁵⁴ To my knowledge, the most eloquent and persuasive defender of *modus vivendi* has been John Gray. See generally GRAY, *supra* note 151.

association.³⁵⁵ Politics is not a matter of adjudicating between competing rights and liberties through moral argument.³⁵⁶ Rather, it is better described as negotiating temporary peace, by addressing unmet interests until new conflicts inevitably re-emerge and necessitate further renegotiation.³⁵⁷

The results of these political negotiations may not reflect the conclusions we would reach through a meticulous process of reason-giving. But such a process can itself become an interminable conversation that only leads to more conflict—conflict that takes us away from the things that give meaning to our lives. For *modus vivendi* and IBDR, political legitimacy is not a function of reaching the most deliberatively defensible judgments in the face of profound differences and disagreements. Instead, it is measured by our success at reaching pragmatic settlements that help us contain the most destructive forms of conflict.

From a deliberative democracy standpoint, politics-as-negotiation is politics as adversarial bargaining, in which power and deception threaten to prevail over reasoning about the common good. “The antonym of deliberation,” Sunstein writes, “is the imposition of outcomes by self-interested and politically powerful private groups.”³⁵⁸ Instead, deliberation is intended “to ensure that political outcomes will be supported by reference to a consensus.”³⁵⁹

But there is a middle path between the deliberative democracy ideal of rational consensus and Schumpeter’s vision of interest-based warfare. The “Copernican revolution” of modern negotiation theory, as Avruch once put it,³⁶⁰ begins with the crucial insight that bargaining over interests need not be an adversarial or distributive contest. Instead, it can and should be a dialogic enterprise in which parties share information, seek to understand the totality of the problem and not just the stated positions, and propose solutions that leave them all better off than the status quo ante.³⁶¹ IBDR can add value to *modus vivendi* by illustrating just how such integrative practices can improve

³⁵⁵ See John Gray, *Pluralism and Toleration in Contemporary Political Philosophy*, 48 POL. STUD. 323, 331 (2000).

³⁵⁶ See John Gray, *Reply to Critics*, 9 CRITICAL REV. OF INT’L SOC. & POL. PHIL. 323, 336 (2006).

³⁵⁷ See *id.* at 323. This is similar to Menkel-Meadow’s conception of provisional or ad hoc solutions that help achieve justice and peace. See Carrie Menkel-Meadow, *supra* note 23, at 26.

³⁵⁸ Sunstein, *supra* note 37, at 1550.

³⁵⁹ *Id.*

³⁶⁰ See Avruch, *supra* note 182, at 82.

³⁶¹ MNOOKIN ET AL., *supra* note 172, at 12 (“By definition, whenever there’s a negotiated agreement, *both* parties must believe that the negotiated outcome leaves them at least as well off as they would have been if there were no agreement.”).

DELIBERATIVE DEMOCRACY AS DISPUTE RESOLUTION?

the case-by-case negotiations that the latter considers to be the stuff of politics in a world of thoroughgoing pluralism.

By the same token, *modus vivendi* can show IBDR that the task of government is not, as Fiss once declared, “to bring a recalcitrant reality closer to our chosen ideals.”³⁶² Instead, it is a continual project of appreciating the diversity and complexity of those ideals and of finding constructive, freely chosen ways of living with the contradictions among them. What is recalcitrant is not the reality of human experience—our apparent irrationality in the face of conflict or our undeniable needs and interests. Rather, it is the conviction that it is possible to agree on certain “chosen ideals”—or discursive procedures for arriving at them—whose undeniable reasonableness makes it legitimate for us to impose on others. No doubt this is true in some cases. But I contend that IBDR’s ambitions for politics are cast from a different mold. Those ambitions have less to do with metanarratives of justification or even with fostering participatory or dialogic processes. Instead, they involve finding ways of working together to negotiate provisional, revisable, and authentic interest-based accommodations that are superior to the available alternatives and, in this way, help “make the world a better place.”³⁶³

³⁶² Fiss, *supra* note 4, at 1089.

³⁶³ FISHER ET AL., *supra* note 6, at 154–55 n. (arguing that interest-based problem solving has a number of “social benefits,” including “serv[ing] values of caring and justice” and helping to “make the world a better place”).

